2006 Legal Update

CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING

2006
LEGAL UPDATE

TELECOURSE REFERENCE GUIDE

THE MISSION OF THE CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING IS TO CONTINUALLY ENHANCE THE PROFESSIONALISM OF CALIFORNIA LAW ENFORCEMENT IN SERVING ITS COMMUNITIES

Published 2005

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MISCELLANEOUS

INTRODUCTION

This telecourse reference guide addresses important case decisions and statutory law changes implemented during the legislative year. In an effort to expand this program to a statewide law enforcement audience, satellite transmission of the legislative update began in 1990. With the advances in technology, it is now distributed through other means. The program is intentionally designed to facilitate later use during roll call briefings.

The telecourse reference guide is designed to be used in conjunction with the training course. Materials are arranged to follow along the program sequence. Blank space has been provided to write notes, record information not included in the text, or to jot down questions.

Questions regarding this program should be directed to Jody Buna, Senior Law Enforcement Consultant, Training Program Services Bureau at the Commission on POST, (916) 227-4885

CHANGES IN

GENERAL LAW ENFORCEMENT

LAWS

CRIME: TRESPASS

Penal Code Sections 171.5 and 602
Chapter 289 / Assembly Bill 280

SUMMARY: Passenger vessel terminal areas are treated just like airports for security purposes.

HIGHLIGHTS:

- Existing law prohibits a person from knowingly possessing specified weapons and other items within any sterile area, as defined, of an airport, except as specified.
- This law would apply this prohibition to the sterile area of a passenger vessel terminal, as defined, except as specified.
- Existing law prohibits an unauthorized person from knowingly entering any airport operations area, as defined, if the area has been posted with certain notices. Existing law provides that a person convicted of violating this provision is punishable by a specified fine or term of imprisonment, or both, if he or she refuses to leave the area after being requested to do so by a peace officer or authorized personnel.
- This law would apply this prohibition and penalty, in addition, to the shoreside boundary of a passenger vessel terminal operations area, as defined, and to the waterside boundary of such an operations area if notices have been posted in accordance with these requirements or in another specified manner.
- Existing law prohibits a person from intentionally avoiding submission to screening and inspection when entering or reentering a sterile area of an airport, except as specified. Existing law provides that a violation of this prohibition that is responsible for the evacuation of an airport terminal is punishable by a specified term of imprisonment under certain circumstances.
- This law would apply this prohibition, in addition, to the sterile area of a passenger vessel terminal, and would apply this penalty, in addition, to the evacuation of a passenger vessel terminal under similar circumstances.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Security trespass laws now apply to passenger vessel terminal areas.

NOTES:

CRIME: TRESPASS

Penal Code Section 602
Chapter 378 / Senate Bill 584

SUMMARY: Security checkpoints may not be bypassed at airports, passenger vessel terminals and now at government buildings.

HIGHLIGHTS:

- Existing law makes it unlawful for persons to engage in certain acts of trespass and punishes most trespasses by a fine not exceeding $1,000, imprisonment in a county jail for a period not exceeding 6 months, or by both that fine and imprisonment.

- This law would make it a trespass to enter or reenter a courthouse or a city, county, city and county, or state building after intentionally avoiding submission to the screening and inspection of one's person and accessible property in accordance with the procedures being applied to control access if the building's entrances have been posted so as to give reasonable notice that prosecution may result from that act.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Bypassing security checkpoints at government buildings is now a crime.

NOTES:

CRIME: CRIMINAL STREET GANG

Penal Code Section 186.22
Chapter 482 / Senate Bill 444

SUMMARY: Identity theft and manufacture and sale of false identification and access cards, combined with any of the previously listed offenses listed in 186.22, can enhance sentences of gang members.

HIGHLIGHTS:

- Existing law, as amended by initiative, provides that any person who participates in any criminal street gang with knowledge that its members engage in a pattern of criminal gang activity and who promotes felonious criminal conduct shall be punished, as specified.
- Existing law defines a pattern of criminal gang activity as the commission, attempt to commit, conspiracy to commit, solicitation for, or conviction of two or more listed offenses, as specified.
- This law would add various crimes relating to identity theft, and the manufacture and sale of false identification and access cards to those offenses which if committed by members of the criminal street gang establish a pattern of criminal gang activity for purposes of these provisions, however, such a pattern would not be established by commission of one or more of these offenses alone, in addition, an offense already listed in existing law would also have to have been committed.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Gang members can get longer prison sentences if involved in identity theft and manufacture and sale of false identification and access cards

NOTES:

CRIME: DECEPTIVE IDENTIFICATION DOCUMENTS

Penal Code Section 483.5
Chapter 326 / Assembly Bill 1069

SUMMARY: Persons may not posses any device intended to be used for producing identification documents not issued by a governmental agency of this state, another state, or the federal government.

HIGHLIGHTS:

- Existing law prohibits a deceptive identification document, as defined, from being manufactured, sold, offered for sale, furnished, offered to be furnished, transported, offered to be transported, or imported or offered to be imported into this state, except as specified.
- Existing law defines "deceptive identification document" with reference to a document not issued by a governmental agency of this state, another state, or the federal government.
- This law would, in addition, prohibit a document-making device, as defined, from being possessed with the intent that the device will be used to manufacture, alter, or authenticate a deceptive identification document.
- A conviction would be punishable by imprisonment in a county jail not exceeding one year, or a fine not exceeding $1,000, or by both imprisonment and that fine.
- The law would also revise the definition of "deceptive identification document" to include a document not issued by a governmental agency of a foreign government, a political subdivision of a foreign government, an international government, or an international quasi-governmental organization.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The devices used to produce false identification are now illegal to posses.

NOTES:

CRIME: INTERNET REGULATION

Business and Professions Code Section 22948 & 22948.2
Chapter 437 / Senate Bill 355

SUMMARY: This law defines the new Anti-Phishing Act of 2005. It makes it unlawful for anyone to represent themselves as a business in order to electronically elicit personal identifying information.

HIGHLIGHTS:

- Existing law, the Consumer Protection Against Computer Spyware Act, provides specified protections for the computers of consumers in this state against certain types of computer software.
- This law would enact the Anti-Phishing Act of 2005.
- The law would make it unlawful for any person, through the Internet or other electronic means, to solicit, request, or take any action to induce another person to provide identifying information by representing itself to be a business without the approval or authority of the business.
- The law would provide certain civil remedies and civil penalties for a violation in that regard.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now unlawful to falsely represent oneself as a business in order to extract personal information from people.

NOTES:

HUNTING: INTERNET HUNTING.

Fish and Game Code Section 3003 (Added)
Chapter 672 / Senate Bill 1028

SUMMARY: This law would make it unlawful to shoot, shoot at, or kill any bird or mammal with any gun or other device accessed via an Internet connection in this state.

HIGHLIGHTS:

- Existing law sets forth the methods and conditions of taking any bird or mammal and specifies that it is unlawful to take birds or mammals with firearms or with bow and arrow when intoxicated.
- Existing law also requires each person that takes birds or mammals in California to apply for, and be granted, a hunting license.
- This law would make it unlawful to shoot, shoot at, or kill any bird or mammal with any gun or other device accessed via an Internet connection in this state.
- The law would make it unlawful for any person, firm, corporation, partnership, limited liability company, association, or other business entity to own or operate a shooting range, site, or gallery located in the state for purposes of the online shooting or spearing of any bird or mammal and for any person, firm, corporation, partnership, limited liability company, association, or other business entity to create, maintain, or utilize an Internet Web site, or a service or business via any other means, from any location within the state for purposes of the online shooting or spearing of any bird or mammal.
- This law would make it unlawful to possess or confine any bird or mammal in furtherance of any activity prohibited by The law, and would also make it unlawful to import or export any bird or mammal, or any part thereof, that is killed by any device accessed via an Internet connection, as provided.
- This law would specify that any bird or mammal possessed in violation of this bill would be subject to seizure by the Department of Fish and Game.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now unlawful to internet hunt.

NOTES:

PROBATION/PAROLE: ELECTRONIC MONITORING OF OFFENDERS

Penal Code Sections 1210.7-1210.15 & 3010-3010.9 (Added)
Chapter 484 / Senate Bill 619

SUMMARY: Parolees and probationers that require a high level of supervision may now be monitored by electronic GPS devices.

HIGHLIGHTS:

- Existing law authorizes probation as an alternative to incarceration for various offenses.
- This law would authorize county probation departments to use global positioning system technology to supervise persons on probation, as specified.
- Existing law authorizes the release of prisoners to parole.
- Existing law also authorizes electronic monitoring of certain parolees.
- This law would add new provisions authorizing the Department of Corrections and Rehabilitation to use global positioning system technology to supervise persons on parole, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The technology used to monitor parolees and probationers may be used by law enforcement in identifying possible suspects involved in criminal activity.

NOTES:

HOME DETENTION: ELECTRONIC MONITORING

Penal Code Section 1203.016
Chapter 488 / Senate Bill 963

SUMMARY: This law would authorize the use of global positioning system devices and other supervising devices for home detention monitoring.

HIGHLIGHTS:

- Existing law permits counties to authorize a home detention program using electronic monitoring, as specified.
- This law would authorize the use of global positioning system devices and other supervising devices for those purposes.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law has a negligible effect on law enforcement.

NOTES:

SEX OFFENDERS: PAROLE PLACEMENT

Penal Code Section 3003
Chapter 463 / Assembly Bill 113

SUMMARY: High risk sex offenders may not live closer than ½ mile of a K-12 school.

HIGHLIGHTS:

- Under existing law, an inmate who is released on parole for certain sex offenses involving child victims or dependent persons is prohibited from residing within one-quarter mile of any public or private school, for the duration of his or her parole.

- This law would prohibit, in addition, an inmate who is released on parole for those sex offenses whom the Department of Corrections and Rehabilitation determines to pose a high risk to the public from residing within one-half mile of a public or private school.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is a violation of law for a high risk sex offender to reside closer that ½ mile of a school.

NOTES:

SEXUAL ASSAULTS: MEDICAL EXAMS

Penal Code Section 11160.1 (Added)
Chapter 133 / Assembly Bill 998

SUMMARY: Health practitioners are now required to furnish law enforcement with a sexual evidence report when a sexual assault suspect is examined.

HIGHLIGHTS:

- Existing law requires health practitioners, as defined, who provide medical services to certain persons to immediately make a report to a local law enforcement agency that contains certain personal and medical information. Those certain persons include persons suffering from an injury inflicted by a firearm, and persons suffering from an injury inflicted as the result of assaultive or abusive conduct.

- This law would require health practitioners to also make a report to a local law enforcement agency upon providing medical services to persons in the custody of law enforcement from whom evidence is sought in connection with the investigation of a sexual assault crime.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement will now receive a sexual evidence report when a suspect is treated at a health care facility.

NOTES:

STATUTE OF LIMITATIONS: SEX CRIMES

Penal Code Sections 801.1 and 803
Chapter 479 / Senate Bill 111

SUMMARY: This law changes the statute of limitations for certain sexual offenses that were committed when the victim was under 18 from 10 years to prior to the victim's 28th birthday. A criminal complaint may then be filed within one year of the reported crime.

HIGHLIGHTS:

- Existing law requires that prosecution for certain felony sex offenses commence within 10 years after commission of the offense.
- This law would instead state that prosecution for certain felony sex offenses that are alleged to have been committed when the victim was under the age of 18 years may be commenced any time prior to the victim's 28th birthday.
- Existing law specifies that a criminal complaint may be filed within one year of the date of a report to a responsible adult or agency, as defined, by a child who is the victim of certain sex crimes, or within one year of the date of a report to a California law enforcement agency by a person under 21 years of age who is the victim of certain sex crimes.
- This law would repeal those provisions.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The statute of limitations has been extended from 10 years to prior to the victims 28th birthday for certain listed sex offenses.

NOTES:

SEX OFFENDERS: AUTOMATED DRUG DELIVERY SYSTEM

Health and Safety Code Section 1261.6
Chapter 469 / Assembly Bill 522

SUMMARY: State Department of Health Services shall not provide or pay for any prescription drug or therapy to treat erectile dysfunction for any Medi-Cal recipient required to register as a sex offender

HIGHLIGHTS:

- Existing law provides for the Medi-Cal program, which is administered by the State Department of Health Services and under which qualified low-income persons receive health care services, pursuant to a schedule of health care benefits. The Med-Cal program is, in part, governed and funded by federal Medicaid provisions.
- Existing law law requires a person who has committed one or more designated sex crimes to register with the law enforcement agency of the city county, city and county, or campus in which the person resides.
- Existing law provides that the Department of Justice shall make available information concerning specified registered sex offenders to the public via an internet Web site.
- This law would provide that the State Department of Health Services shall not provide or pay for any prescription drug or therapy to treat erectile dysfunction for any Medi-Cal recipient required to register pursuant to these provisions, except to the extent it is required under federal law.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law has a negligible effect on law enforcement.

NOTES:

CRIME: CONTACT WITH MINORS

Penal Code Sections 272 and 502.01
Chapter 461 / Assembly Bill 33

SUMMARY: This law expands the age of child luring as described in 272.(b)(1) from 12 years to under 14 years. This law also provides that if the defendant used his or her computer to communicate with the victim in the attempt to lure the victim then that computer is subject to forfeiture.

HIGHLIGHTS:

- Existing law provides that it is a crime for an adult stranger to contact or communicate with a minor, 12 years of age or younger, who the adult knew or should have known was 12 years of age or younger, to lure him or her away, as specified, for any purpose.
- Existing law provides that this crime is punishable by a fine, by imprisonment in a county jail, or by both.
- This law would prohibit this conduct when engaged in with a person who is under 14 years of age.
- This law would provide that this crime is punishable as an infraction or a misdemeanor, as specified.
- Existing law provides that certain property, such as a computer, may be subject to forfeiture if used by a defendant to commit particular offenses, as specified.
- Existing law further provides the process by which property is forfeited and by which it may be recovered by the owner.
- This law would provide that if the defendant used his or her computer to communicate with the victim in the attempt to lure the victim then that computer is subject to forfeiture.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The age of child luring has changed to under 14 and if a computer is used in the crime it is subject to forfeiture.

NOTES:

CRIME: REGISTERED SEX OFFENDERS

Penal Code Sections 290, 290.01, 290.4, 290.45, 290.46, 290.5, 290.6, 666.7, and 1170.11, Civil Code Section 2079.10a, Health and Safety Code Section 1522.01 Chapter 722 / Assembly Bill 1323

SUMMARY: This law changes the sex offender registry information from being delivered via CD-ROM and a "900" phone number to entirely WEB based and a public request system. The public may request information on up to six individuals on a DOJ form for a fee. Also law enforcement agencies may include information on any sex offender(s) they deem necessary on their agency WEB site.

HIGHLIGHTS:

- ♦ Pursuant to existing law, information about registered sex offenders is made available by the Department of Justice via an Internet Web site.
- ♦ This law would make conforming changes in provisions of law regarding notices to be included in lease or rental agreements, or contracts for sale of residential real property, and required disclosures of an operator of a community care facility that accepts a registered sex offender as a client, as specified.
- ♦ Existing law provides that certain information regarding a registered sex offender on a university, college, or community college campus may be released to members of the campus community.
- ♦ This law would clarify that this information will be made available regarding registered sex offenders as to whom information is not available to the public via the Department of Justice Internet Web site.
- ♦ Existing law, operative until July 1, 2007, requires the Department of Justice to continually compile information about certain registered sex offenders categorized by community of residence and ZIP Code, as specified, and to make that information available to the public via a CD-ROM that can be reviewed at local law enforcement agencies.
- ♦ Existing law also requires the department to operate a "900" telephone number that members of the public may call to inquire whether a named individual is among those registered sex offenders about whom information is made available.
- ♦ This law would delete these provisions.
- ♦ This law would instead require the department to operate a service through which members of the public may make an inquiry, regarding at least 6 individuals, as to whether a particular individual is required to register as a sex offender and is subject to public notification, as specified
- ♦. This law would provide that the department may establish a fee for these requests which shall be deposited into the Sexual Predator Public Information Account within the Department of Justice.

- This law would also provide that misuse of the information provided by the service is a crime punishable as specified.

- Existing law provides that whenever a peace officer reasonably suspects that a child or other person is at risk from a sex offender, a law enforcement agency may provide information about that registered sex offender to persons, agencies, or organizations that the offender is likely to encounter, as specified.

- Existing law also provides that a designated law enforcement agency may advise the public of the presence of high-risk sex offenders in its community, as specified.

- This law would instead provide that any designated law enforcement entity may provide information to the public about a registered sex offender by whatever means the entity deems appropriate when necessary to ensure the public safety; however, it may not authorize disclosure of this information by another on an Internet Web site.

- Existing law requires the Department of Justice to make available information concerning persons who are required to register as sex offenders available to the public via an Internet Web site that includes either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides.

- Existing law provides that it is a crime, punishable as specified, for a person who is required to register pursuant to this section to enter the department's Internet Web site.

- This law would provide that if the offender is registered as a transient, the county in which a person registered will be provided on the Internet Web site.

- This law would provide that a designated law enforcement entity may make information concerning registered sex offenders available via an Internet Web site.

- This law would provide that it is a crime for a person who is required to register as a sex offender to enter any Internet Web site established pursuant to these provisions.

- Existing law provides that if a person has been convicted of the commission or attempted commission of felony sexual battery, misdemeanor child molestation, or specified sexual offenses for which the offender is eligible for, granted, and successfully completes probation, that person may file an application with the Department of Justice for an exclusion from the Internet Web site, as specified.

- This law would revise this provision to no longer authorize a person who has been convicted of the commission or attempted commission of specified sexual offenses for which the offender is eligible for, granted, and successfully completes probation to file for an exclusion from the Internet Web site.

- The law would, however, authorize the application for exclusion from the Internet Web site by a person who has been convicted of the commission or attempted commission of an offense for which the offender is on probation at the time of his or her application or has successfully completed probation, as defined, provided the offender submits to the Department of Justice a certified copy of an official court document, as specified, that clearly demonstrates that the

offender was the victim's parent, stepparent, sibling, or grandparent, and the crime did not involve specified sexual offenses.

- Existing law provides that when any person is convicted of 2 or more felonies and a consecutive term of imprisonment is imposed, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements. The principal term and the subordinate term consist in part of the term imposed for specified enhancements, as listed.

- This law would, with respect to the list of specified enhancements upon which the calculation of the term of imprisonment is in part based, add to that list (1) enhancements imposed for a violation of the provisions relating to the dissemination of specified information regarding sex offenders to the public via the Internet Web site; and (2) enhancements imposed for a felony violation of provisions relating to unlawful sexual intercourse, sodomy, and lewd and lascivious acts committed with a minor for money or other consideration.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement agencies may include information on any sex offender(s) they deem necessary on their agency WEB site. State sex offender information is available through the DOJ WEB site and no longer on CD-ROM.

NOTES:

REGISTERED SEX OFFENDERS: DISMISSALS OF CONVICTIONS: RESIDENCE CHANGES

Penal Code Sections 290 and 1203.4, (Repeal) Section 290.1
Chapter 704 / Assembly Bill 439

SUMMARY: This law requires sex offenders that are going to move but do not have their new address when they vacate the previous residence to notify the previous law enforcement agency by certified or registered mail once they know the new address. Also if they just move from one residence to another instead of notifying law enforcement in writing they now must make the notification in person.

HIGHLIGHTS:

- Existing law requires persons convicted of certain sex offenses to register as sex offenders, as specified.
- Existing law provides that certain persons required to register as sex offenders shall be relieved of the duty to register upon obtaining a certificate of rehabilitation, and that certain other persons required to register as sex offenders shall be relieved of the duty to register upon receiving a full pardon.
- Existing law allows a court to dismiss the accusation or information against certain persons after conviction for a crime, and provides that such a dismissal alone shall not relieve a person from the duty to register as a sex offender.
- This law would reorganize and recast these provisions relating to the duty of persons to register as sex offenders after the dismissal of an accusation or information.
- Existing law requires a person who is required to register pursuant to these provisions and who changes his or her residence address to inform the law enforcement agency with which he or she last registered of the new address or transient location and any plans he or she has to return to California, if known.
- Existing law requires that this notice be provided in writing.
- This law would apply this requirement only to a person who was last registered at a residence address, and would require that the notice be provided in person.
- Existing law requires a person who is required to register pursuant to these provisions and who does not know his or her new residence address or location at the time of the move to later notify the last registering agency of the new address or location.
- This law would require that this notice be provided in writing, sent by certified or registered mail.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement will be seeing registered sex offenders in person when they move.

NOTES:

CUSTODY: CRIMINAL PROCEDURE

Penal Code Section 851.5
Chapter 635 / Assembly Bill 760

SUMMARY: This law gives arrestees that have minor children two additional booking phone calls to arrange for child care.

HIGHLIGHTS:

- Existing law provides an arrested person with certain rights regarding the opportunity to make telephone calls incident to the person being booked or detained, as specified. The willful deprivation of these rights by a public officer or employee is a misdemeanor.
- This law would, in addition, provide that when, during booking, an arrested person is determined to be a custodial parent of a minor child or children, the person would be entitled to make two telephone calls at no expense, as specified, for the purpose of arranging for the care of the minor child or children.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Arrestees that have minor children now receive two additional booking phone calls to arrange for child care.

NOTES:

CRIME: BODY PIERCING

Penal Code Section 19.8 & 652 (Added)
Chapter 307 / Assembly Bill 646

SUMMARY: This law requires parental permission before a minor can get a body piercing.

HIGHLIGHTS:

- Existing law makes it a misdemeanor to tattoo or offer to tattoo a person under the age of 18 years.
- This law would make it an infraction, punishable by a fine not exceeding $250, for any person to perform or offer to perform body piercing, as defined, upon a person under the age of 18 years, unless performed in the presence of, or as directed by a notarized writing by, that person's parent or guardian.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Minors may not get a body piercing without parental approval.

NOTES:

VIOLENT VIDEO GAMES: SALES TO MINORS

Civil Code Sections 1746-1746.5 (Added)

Chapter 638 / Assembly Bill 1179

NOTE: A preliminary injunction has been issued by the U.S. District Court for the Northern District of California temporarily blocking this law from taking effect.

SUMMARY: This law makes it a civil code violation with a fine up to $1,000 for each offense to sell or rent a violent video game to a minor. A violent video game is one that includes killing, maiming, dismembering or sexually assaulting an image of a human being.

HIGHLIGHTS:

- Existing law regulates the sale of certain merchandise, such as political items and sports memorabilia.
- This law would require violent video games to be labeled as specified and would prohibit the sale or rental of those violent video games, as defined, to minors.
- The law would provide that a person who violates the act shall be liable in an amount of up to $1,000 for each violation.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Minors may not buy or rent violent video games.

NOTES:

ALCOHOLIC BEVERAGES: PROOF OF AGE: MILITARY IDENTIFICATION CARDS

Business and Professions Code Section 25660
Chapter 68 / Assembly Bill 764

SUMMARY: This law allows military ID without a photo to qualify as bona-fide identification when accompanied by any other form of bona-fide ID.

HIGHLIGHTS:

- The Alcoholic Beverage Control Act makes it a misdemeanor for any person under the age of 21 years to purchase any alcoholic beverage or consume any alcoholic beverage in any on-sale premises.
- The act also subjects a holder of a license to sell alcoholic beverages to criminal prosecution and suspension or revocation of that license if the licensee sells any alcoholic beverages to any person under the age of 21 years.
- Existing law provides that a licensee's acceptance of bona fide evidence, as defined, constitutes a defense to any action against the licensee.
- Existing law requires that evidence to contain a description of the person.
- Existing law includes a military identification card issued to a member of the Armed Forces as an eligible identification card so long as that card includes a description of the cardholder. Identification cards issued by the Armed Forces no longer contain a physical description of the cardholder. For security purposes, that information is electronically encrypted in order to avoid tampering with the card.
- This law would authorize the acceptance of a military identification card as bona fide evidence that a person is 21 years of age, provided that proof of majority is further substantiated with other identification, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law has a negligible effect on law enforcement.

NOTES:

ATTEMPTED MURDER: CUSTODIAL OFFICERS

Penal Code Section 664
Chapter 52 / Assembly Bill 999

SUMMARY: This law would include the crime of attempted murder of a custodial officer in the same category as a police officer or firefighter for enhanced sentencing purposes.

HIGHLIGHTS:

- Existing law provides that an attempt to commit willful, deliberate, and premeditated murder, as defined, is punishable by imprisonment in the state prison for life with the possibility of parole.
- Existing law further provides that an attempted murder of a peace officer or firefighter, as defined, committed under specified circumstances, is punishable by imprisonment in the state prison for life with the possibility of parole, or by 15 years to life if it is also proven that the attempt was willful, deliberate, and premeditated.
- This law would provide that the elements defining the crime of attempted murder of a police officer or firefighter, and the penalties therefore, also apply to the attempted murder of a custodial officer, as defined.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Enhanced sentences apply to the attempt murder of custody officers as well as peace officers and fire fighters.

NOTES:

CRIME: ELDER AND DEPENDENT ADULT ABUSE

Government Code Section 7480, Welfare and Institutions Code Sections 15634, 15640, and 15655.5 (Repeal) Section 15630.1 Chapter 140 / Senate Bill 1018

SUMMARY: This law makes officers and employees of financial institutions mandated reporters when they suspect elder financial abuse. This law does not take effect until January 1, 2007.

HIGHLIGHTS:

- Existing law provides for the confidentiality of financial records but does not prohibit various state and local officers and agencies from requesting information from an office or branch of a financial institution and the office or branch from responding to the request, as to whether a person has an account or accounts at that office or branch and if so, any identifying numbers of the account or accounts.
- This law, from January 1, 2007, to January 1, 2013, inclusive, would provide that a county adult protective services office and a long-term care ombudsman when investigating the financial abuse of an elder or dependent adult is similarly not prohibited from requesting financial information and the office or branch is not prohibited from responding to the request.
- Existing law, the Elder Abuse and Dependent Adult Civil Protection Act, establishes procedures for the reporting, investigation, and prosecution of elder and dependent adult abuse. These procedures require persons, defined as mandated reporters, to report known or suspected instances of elder or dependent adult abuse.
- Under existing law, care custodians of elder or dependent adults and local law enforcement agencies are mandated reporters. A violation of the reporting requirements by a mandated reporter is a misdemeanor.
- This law, from January 1, 2007, to January 1, 2013, inclusive, would include within these reporting requirements mandated reporters of suspected financial abuse, as defined, and would, with certain exceptions, make failure to comply with these requirements subject to a civil penalty.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Bank and credit union officers and employees may be reporting financial elder abuse as mandated reporters beginning January 1, 2007.

NOTES:

CRIME: RAILROAD OBSTRUCTIONS

Penal Code Sections 369b and 1463.12 (Added) 218.1
Chapter 716 / Assembly Bill 1067

SUMMARY: This law makes it a felony to place an obstruction on or near a train track that results in damaging or derailing the train.

HIGHLIGHTS:

- Existing law provides that it is unlawful for a person to take various actions with the intent to derail or wreck a train. A violation is punishable as a felony by life imprisonment without possibility of parole.

- This law would provide that a person who unlawfully and with gross negligence places or causes to be placed any obstruction on a railroad track that proximately results in the damaging or derailing of a train, or injury to passengers or employees, is guilty of a crime

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Damaging or derailing a train by placing on object on or near the tracks is now a felony.

NOTES:

CRIME: ANIMAL CRUELTY

Penal Code Section 597z (Added)
Chapter 669 / Senate Bill 914

SUMMARY: This law makes it unlawful for a person not a breeder to sell a dog under eight weeks of age without the written approval of a veterinarian.

HIGHLIGHTS:

- Existing law makes it a crime to engage in animal cruelty, as specified.
- This law would provide that, except as otherwise authorized under any other provision of law, it shall be an infraction, punishable by a fine not to exceed $250, or a misdemeanor, for any person, other than an organization that provides services as a public animal sheltering agency or specified pet dealers or rescue groups, to sell one or more dogs under 8 weeks of age, unless, prior to any physical transfer of the dog or dogs from the seller to the purchaser, the dog or dogs are approved for sale, as evidenced by written documentation from a licensed veterinarian.
- The law would provide that the sale of a dog or dogs shall not be considered complete, and thereby subject to the requirements and penalties of the law, unless and until the seller physically transfers the dog or dogs to the purchaser; and that, with respect to the sale of 2 or more dogs in violation of this provision, each dog unlawfully sold shall represent a separate offense.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law has a negligible effect on law enforcement.

NOTES:

CRIME: IMPERSONATING A VETERAN

Penal Code Section 532b
Chapter 457 / Assembly Bill 787

SUMMARY: This law makes it a misdemeanor for a person to falsely claim to be, or present himself or herself to be a veteran member of the Armed Forces of the United States, with the intent to defraud. This law would not apply to face-to-face solicitations involving less than $10.

HIGHLIGHTS:

- Under existing law, any person who represents himself or herself as a veteran or ex-serviceperson of any war in which the United States was engaged in connection with the soliciting of aid or the sale or attempted sale of any property, is guilty of a misdemeanor.
- This law would also make it a misdemeanor for a person to falsely claim to be, or present himself or herself to be a veteran member of the Armed Forces of the United States, with the intent to defraud.
- The law would not apply to face-to-face solicitations involving less than $10.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law does not apply to person posing as veterans begging for dollar amount less than $10.

NOTES:

ENTERTAINMENT: EMERGENCY EXITS

Health and Safety Code Section 13113.6 (Added)
Chapter 537 / Assembly Bill 1194

SUMMARY: This law would require that any person, as specified, that owns, rents, leases, or manages a facility that hosts a ticketed event for live entertainment make an announcement of the availability of emergency exits prior to the beginning of the live entertainment at a venue with an occupancy capacity of between 50 and 1000.

HIGHLIGHTS:

- Existing law requires the State Fire Marshal to prepare and adopt regulations establishing minimum requirements for the prevention of fire and for the protection of life and property against fire and panic in, among other things, any assembly occupancy where 50 or more persons may gather together in a building, room, or structure for the purpose of amusement, entertainment, instruction, deliberation, worship, drinking or dining, awaiting transportation, or education.

- This law would require that any person, as specified, that owns, rents, leases, or manages a facility, as defined, that hosts a ticketed event for live entertainment make an announcement of the availability of emergency exits prior to the beginning of the live entertainment. A violation of this provision would be a misdemeanor.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: 13113.6 is added to the Health and Safety Code making it a crime to fail to make an emergency exit announcement at entertainment venues of between 50 and 1000 people.

NOTES:

CRIME: HUMAN TRAFFICKING

Penal Code Sections 236.1and 236.2 (Added)
Chapter 240 / Assembly Bill 22

SUMMARY: This law would establish the new felony of human trafficking of a person for forced labor, services, prostitution or other specified felonies.

HIGHLIGHTS:

- Existing law establishes the offenses of slavery and involuntary servitude.
- Existing law also makes it an offense to entice an unmarried female minor for purposes of prostitution, as specified, or to aid or assist with the same, or to procure by fraudulent means, any female to have illicit carnal connection with any man.
- Existing law also makes it a crime to take away any minor as specified, for purposes of prostitution.
- This law would establish the crime of trafficking of a person for forced labor or services or for effecting or maintaining other specified felonies, and the crime of trafficking of a minor for those purposes, punishable by terms of imprisonment in the state prison for 3, 4, or 5 years, or 4, 6, or 8 years, respectively.
- The law would permit a victim of trafficking to bring a civil action for actual damages, provide for restitution and punitive damages, and would establish a victim-caseworker privilege.
- The law would require state and local law enforcement agencies to issue a Law Enforcement Agency Endorsement for all trafficking victims within 15 business days of initial contact with the victim.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This new felony makes it unlawful through coercion or fear to force someone to work to pay off a smuggling debt or other purpose.

NOTES:

CHANGES IN

FIREARMS

LAWS

FIREARMS: COURT ORDERS

Penal Code Sections 136.2 and 11106 (Amended)
Chapter 702 / Assembly Bill 1288

SUMMARY: This bill mandates the court presiding over a domestic violence case to issue a protective order to a defendant that includes a firearms prohibition, where good cause for its issuance exists, even if the court did not issue a protective order as a result of the domestic violence charge. Relinquishment of any firearms owned or possessed by the subject would be required. This bill would allow law enforcement to advise certain domestic violence victims if the state database reflects that their abuser purchased or possesses a firearm. A victim who received this information could disclose it to others only to the extent that he or she believed it necessary to protect himself, herself, or a third party from bodily harm.

HIGHLIGHTS:

- Existing law authorizes a court to issue a protective order to a person, that includes a temporary prohibition against the ownership, possession, purchase of firearms, whether actual or attempted, if he or she has established a good cause belief that he or she has or is likely to harm, intimidate, or dissuade another person. As part of the prohibition all firearms owned or in the possession of the defendant must be relinquished.

- Existing law requires the Attorney General to retain a complete record of forms and applications submitted to the Department of Justice to record the sale and/or transfer of handguns. The information contained within these records is accessible upon proper application, to law enforcement agencies as specified.

- The state would be required to reimburse local agencies for additional duties imposed as a result of this state-mandated local program.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill supports law enforcement agencies in their attempts to remove firearms from the hands of those that are likely to harm others, including but not limited to; their immediate family members. It will help to correct a dangerous problem in existing law that often allows a person who should be prohibited from firearms to commit further crimes with their firearms.

NOTES:

FIREARMS: AMMUNITION

Penal Code Sections 12316 (Amended)
Chapter 681 / Senate Bill 48

SUMMARY: The bill allows ammunition vendors to sell ammunition or reloaded ammunition that can be used in both a rifle and a handgun to persons at least age 18 but less than age 21 if the vendor believes the ammunition is being acquired for use in a rifle and not a handgun based on bona fide evidence of identity. This bill would remove the element of the ammunition vendors "knowing the person to be under the age" of either 18 or 21 from the definition of the defense. The bill requires reliance upon bona fide evidence of majority and identity in order for the affirmative defense to apply. Bona fide evidence of majority and identity means a document issued by a federal, state, county, or municipal government, or subdivision or agency including a driver's license, CA ID card, Military ID card or other form of ID that bears the name, date of birth, description, and a picture of the person.

HIGHLIGHTS:

- Existing law makes it an offense for any person, corporation, or dealer to sell ammunition or reloaded ammunition to a person, knowing that person to be under age 18.
- Existing law makes it an offense for any person, corporation, or dealer to sell ammunition intended for use in a handgun to a person, knowing that person to be under age 21.
- Existing law established an affirmative defense to the offense if the seller relied upon bona fide evidence of majority and identity.
- Existing law does not allow persons prohibited from owning or possessing a firearm to have in possession any ammunition or reloaded ammunition.
- The law would remove the "knowing the person to be under the age" from the definition of the defense.
- The law would require reliance upon a picture identification card which contains the name, date of birth, and description of the person.
- The law would allow ammunition vendors to sell ammunition or reloaded ammunition that can be used in both a rifle and a handgun to persons at least age 18 but less than age 21 if the vendor believes the ammunition is being acquired for use in a rifle and not a handgun.
- The law imposes a state-mandated local program.
- No reimbursement is required by this act.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill means that ammunition vendors can sell ammunition that can be used in both a rifle and a handgun if the vendor believes the ammunition will be used in a rifle and not a handgun. The ammunition vendors will rely upon bona fide evidence of majority and identity instead of knowing a person to be under the specified age of 18 or 21.

NOTES:

FIREARMS: SERIALIZED AND UNIQUELY INSCRIBED PROPERTY

Penal Code Sections 11108 (Amended)
Chapter 167 / Assembly Bill 86

SUMMARY: This bill would remove the current requirement that each sheriff or police chief executive send reports containing information for stolen non-serialized property which has unique characteristics or inscriptions permitting accurate identification directly to the Special Services Section of the Department of Justice (DOJ). Instead, this bill would require that local law enforcement agencies (LEA) submit the description of non-serialized uniquely inscribed property and serialized property to the existing DOJ's System. Also, any information entered into the DOJ system regarding a firearm would remain in the system until the firearm was found, recovered, no longer under observation, or the record was deemed to have been entered in error.

HIGHLIGHTS:

- Automated systems within the DOJ currently exist that contain stolen property information (Automated Property System - APS and Automated Firearms System - AFS).
- Existing law directs local LEAs to submit the description of stolen, lost, found, recovered or under observation serialized property directly to DOJ.
- Existing law requires reports of stolen non-serialized property which has unique characteristics or inscriptions to be sent by each sheriff or police chief executive directly to DOJ's Special Services Section.
- This would delete requirements for each sheriff or police chief executive to send property information directly to the Special Services Section of DOJ.
- The law would enable local LEAs to send property information directly to DOJ's APS and/or AFS.
- Any implementation costs shall be reimbursed from funds other than the existing firearms fee-based funds.
- Firearm information would remain in the system until the firearm was found, recovered, no longer under observation, or the record was deemed to have been entered in error.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill means that instead of each sheriff or police chief sending serialized property information to DOJ via the Special Services Section, any local law enforcement agency can submit the description of uniquely inscribed/serialized property directly to the existing DOJ system(s). Information about a firearm would remain in the system(s) until the firearm was found, recovered, no longer under observation, or the record was deemed to have been entered in error.

NOTES:

FIREARMS: PUNISHMENT FOR ASSAULT WEAPONS

Penal Code Sections 12280 (Amended)
Chapter 690 / Assembly Bill 88

SUMMARY: The bill provides a separate and distinct offense for each assault weapon or .50 BMG rifle violation as long as it is not a first violation involving more than two assault weapons/.50 BMG rifles.

HIGHLIGHTS:

- Existing law provides penalties for violations of specified provisions involving assault weapons and .50 BMG rifles.
- PC Section 12280 (3) is added to read: Except in the case of a first violation involving not more than two firearms as provided in subdivisions (b) and (c), for purposes of this section, if more than one assault weapon or .50 BMG rifle is involved in any violation of this section, there shall be a distinct and separate offense for each.
- No reimbursement is required by this act.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill means that each assault weapon or .50 BMG violation will be treated as a separate and distinct violation unless it is a first violation involving no more than two assault weapons or .50 BMG rifles.

NOTES:

FIREARMS: LAW ENFORCEMENT OFFICERS SAFETY ACT OF 2004

Chapter 44 Title 18 U. S. Code Sections 926B & 926C (Added)
United States House of Representatives Bill 218

SUMMARY: This federal law allows active and honorably retired law enforcement officers to carry concealed firearms anywhere in the United States. It does not affect current laws and regulations regarding carrying a firearm aboard aircraft. There are many unanswered questions and concerns about this federal law, and the DOJ firearms Division has assembled a task force to sort out the issues involving this legislation. In the meantime, officers are cautioned about carrying concealed weapons outside of California while out-of-state officers are cautioned about carrying concealed weapons into California.

HIGHLIGHTS:

- Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).

- (b)This section shall not be construed to supersede or limit the laws of any State that--
  (1) permits private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or
  (2) prohibits or restricts the possession of firearms on any State or local government property, installation, building, base, or park.

- (c) As used in this section, the term qualified law enforcement officer' means an employee of a governmental agency who--
  (1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;
  (2) is authorized by the agency to carry a firearm;
  (3) is not the subject of any disciplinary action by the agency;
  (4) meets standards, if any, established by the agency that require the employee to regularly qualify in the use of a firearm;
  (5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and
  (6) is not prohibited by Federal law from receiving a firearm.

- (d)The identification required by this subsection is the photographic identification issued by the governmental agency for which the individual is employed as a law enforcement officer.

- As used in this section, the term `firearm' does not include--
  (1) any machinegun (as defined in section 5845 of the National Firearms Act);
  (2) any firearm silencer (as defined in section 921 of this title); and
  (3) any destructive device (as defined in section 921 of this title).

NOTES:

CHANGES IN

TRAFFIC

LAWS

DRIVER'S LICENSES: PROVISIONAL LICENSING PROGRAM

Vehicle Code Section: 12814.6
Chapter 337 / Assembly Bill 1474

SUMMARY: This bill extends the prohibition for the holder of a provisional driver's license from transporting passengers under the age of 20 from six months to one year. A provisional driver is also prohibited from driving between the hours of 11:00 p.m. and 5:00 a.m. rather than midnight to 5:00 a.m. unless accompanied by a licensed parent or guardian, driving instructor, or a licensed driver who is 25 years of age or older.

HIGHLIGHTS:

- Currently, Section 12814.6 of the Vehicle Code (VC) requires a person under the age of 18 to hold an instruction permit for 6 months before submitting an application for a driver's license. After the minor successfully completes an approved driver education course, he/she is required to complete an additional 50 hours of supervised practice driving prior to receiving a provisional driver's license. At least 10 hours of supervised practice shall be during hours of darkness. A specified adult is then required to certify to the Department of Motor Vehicles (DMV) the practice driving time was completed. Upon obtaining a provisional driver's license a minor may not operate a motor vehicle between the hours of 12 a.m. and 5 a.m. or transport passengers who are under 20 years of age without adult supervision for the first 6 months. These restrictions do not apply to an emancipated minor. A minor may receive an exemption from certain restrictions provided the minor possess a signed statement from the appropriate physician, school principal, employer, or family member. During the second 6 months after obtaining a provisional driver's license, a minor may transport passengers under 20 years of age. This section also specifies fines, penalties, and suspension of driving privileges for a minor who has violated this section's provisions. Additionally, a law enforcement officer is not authorized to stop a motor vehicle for the sole purpose of enforcing this section.

- This section now prohibits a provisional driver from driving between the hours of 11 p.m. and 5:00 a.m., and prohibits a provisional driver from transporting passengers under 20 years of age for an extended period of 12 months.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This legislation does not provide an exemption for provisional licensees who obtained a driver's license during 2005, and are currently beyond the six month minor passenger prohibition required by current law. For example: A provisional licensee who obtained a driver's license in March 1, 2005, may not legally transport passengers under the age of 20 between the hours of 12 midnight and 5 a.m. On January 1, 2006, when this bill takes effect, that same licensee will again be subject to restrictive provisions until March 1, 2006 (12 months after issuance).

The provision prohibiting a law enforcement officer from stopping a motor vehicle for the sole purpose of enforcing this section is still in effect.

NOTES:

VEHICLES: POLICE MOTOR VEHICLE PURSUITS

Vehicle Code Sections 1666.1, 2800.1, 2800.3, 2911, 14602.1, 17004.7
Government Code Section 13955
Penal Code Section 13519.8
Chapter 485 / Senate Bill 719

SUMMARY: This bill increases the punishments for intentionally evading a pursuing officer's motor vehicle, and for evading a peace officer and causing injury or death, revises the minimum standards required for a written motor vehicle pursuit policy in order to maintain civil immunity for personal injury or property damage caused by a fleeing suspect, qualifies innocent victims injured or killed during motor vehicle police pursuits to receive specified reimbursement or compensation from the Victim's Restitution Fund, requires the Department of Motor Vehicles (DMV) to update its driver's handbook and commercial driver's license test, requires traffic safety programs to provide specified motor vehicle pursuit information to the public, and expands the existing pursuit data reporting requirements applicable to California law enforcement agencies.

HIGHLIGHTS:

- This bill increases the punishments for intentionally evading a pursuing officer's motor vehicle, and for evading a peace officer and causing injury or death.

- Revises the minimum standards required for a written motor vehicle pursuit policy in order to maintain civil immunity for personal injury or property damage caused by a fleeing suspect. These standards include the factors to consider when deciding to initiate a pursuit, evaluating the need for immediate capture against risks to peace officers and the public, determining the number of law enforcement vehicles authorized to participate in a pursuit, the role of supervision, communication operators, and air support, driving tactics, pursuit intervention techniques, and guidance to assist with the decision to continue to pursue in various situations.

- Qualifies innocent victims injured or killed during motor vehicle police pursuits to receive specified reimbursement/compensation from the State Victim Restitution Fund.

- Requires the DMV, upon updating the California Driver's Handbook, to include information regarding the risks and punishments associated with fleeing from a peace officer's motor vehicle within the book, and to include at least one question in any of the non-commercial state driver's license tests, to verify an applicant's knowledge of motor vehicle pursuit risks and punishments.

- Requires all traffic safety programs that address public awareness of emergency vehicle operations, and that receive state funding, to include motor vehicle pursuit risk and punishment education in their public awareness campaigns.

- Expands the pursuit data the California Highway Patrol (CHP) is required to track. California law enforcement agencies are also required to report additional data regarding police pursuits. CHP is also required to annually submit a report to the Legislature containing specified information regarding statewide motor vehicle pursuits.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill requires law enforcement agencies to meet minimum standards for developing written pursuit policies in order to maintain civil immunity for personal injury or property damage caused by a fleeing suspect. This bill is the law enforcement pursuit compromise bill sponsored by the California Sheriff's Association, the California Police Chief's Association, the California Peace Officer's Association, and the Peace Officer's Research Association of California.

NOTES:

DRIVING UNDER THE INFLUENCE: DRIVER LICENSE SANCTIONS

Vehicle Code Section 23578
Chapter 89 / Assembly Bill 571

SUMMARY: This law provides that if a person is convicted of a specified violation of driving under the influence (DUI), the court shall consider a concentration of alcohol in the person's blood of 0.15 percent or more, or the refusal to take a chemical test, as a factor to justify enhancing penalties, in determining whether to grant probation, and in determining the enhancement of probation conditions.

HIGHLIGHTS

- Current law, Section 23578 VC, provides that if a person is convicted of DUI pursuant to Section 23152 VC or 23153 VC, the court shall consider a BAC of 0.20 percent or more, or the refusal of the person to take a chemical test, as a special factor that may justify enhancing penalties, in determining whether to grant probation, and, if probation is granted, in determining additional or enhanced terms and conditions of probation.

- This new law amends Section 23578 VC to provide that if a person is convicted of Section 23152 VC or 23153 VC, the court shall consider a concentration of alcohol in the person's blood of **0.15 percent** or more, or the refusal to take a chemical test, as a factor to justify enhancing penalties, in determining whether to grant probation, and in determining the enhancement of probation conditions.

NOTES:

DRIVING UNDER THE INFLUENCE: RESTRICTED DRIVER'S LICENSES

Vehicle Code Sections 13352, 14602.6
Chapter 646 / Assembly Bill 979

SUMMARY: This law authorizes the Department of Motor Vehicles (DMV) to issue a restricted driver's license to a Driving Under the Influence (DUI) violator with a suspended driver's license who is required to complete an 18 to 30 month DUI education/counseling program, after completing the initial 12 months of the program. This law will also apply existing 30-day impoundment procedures to persons driving in violation of a driver's license restriction requiring the operation of a motor vehicle equipped with a functioning, certified Ignition Interlock Device (IID).

HIGHLIGHTS:

- Section 13352 VC requires DMV to immediately suspend or revoke the driving privilege of a person convicted of DUI, and prohibits the reinstatement of that privilege until the person has complied with specified conditions and requires the violator convicted of repeated DUI offenses to have his/her driving privilege suspended for two to five years. After the completion of 12 to 30 months of the suspension period during which participation in a DUI education/counseling program is required, DMV is required to allow the person to obtain a restricted driver's license subject to the utilization of an IID.

- This bill applies the above provisions governing the issuance of restricted drivers' licenses to the above persons after completion of 12 months of the suspension or revocation period in all cases, rather than the current 12 to 30 month range.

- This bill also provides that a person driving his/her vehicle outside driver's license restrictions requiring the operation of a motor vehicle equipped with a certified, functioning IID, is subject to the 30-day vehicle impoundment provisions of Section 14602.6 VC.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This legislation authorizes a peace officer to impound a vehicle for 30 days if the person is driving without the IID as required.

NOTES:

VEHICLES: REPEAT DUI OFFENSE – VEHICLE IMPOUNDMENT

Vehicle Code Section 14602.8
Chapter 656 / Senate Bill 207

SUMMARY: This new law provides peace officers the authority to impound a vehicle driven by a repeat DUI offender for a period of 5 or 15 days, under certain specified conditions. A person driving a vehicle with a Blood Alcohol Content (BAC) of 0.10 percent or greater, or who refuses chemical testing, will be subject to having his or her vehicle impounded for:

- 5 days, if the person has 1 prior conviction of DUI in the last 10 years.
- 15 days, if the person has 2 or more prior convictions of DUI in the last 10 years.

HIGHLIGHTS:

- This impound authority is provided in newly added Section 14602.8 VC.
- The violator must have a prior conviction of Section 23140 VC, 23152 VC, or 23153 VC, and the violation occurred in the last 10 years to qualify for this impound authority.
- This impound authority only applies if the driver has a BAC or 0.10 percent or more, or if the driver refuses chemical testing.
- The registered or legal owner of the impounded vehicle shall have the opportunity for a storage hearing.
- Subdivision (d) of Section 14602.8 VC provides that an impounding law enforcement agency shall release the vehicle prior to the impoundment period under any of the following circumstances:
  - The vehicle is stolen.
  - The vehicle is subject to bailment and is driven by an unlicensed employee of a business establishment, including a parking service or repair garage.
  - When the driver of the vehicle is not the sole registered owner of the vehicle and the vehicle is being released to another registered owner of the vehicle who agrees not to allow the driver to use the vehicle until after the end of the impoundment period.

NOTES:

DRIVER'S LICENSES: SCHOOLBUS LICENSES AND ENDORSEMENTS / MOTORIZED SCOOTERS

Vehicle Code Sections 12804.9, 12517, 15275.1
Chapter 199 / Assembly Bill 1748

SUMMARY: Under existing law, operative September 20, 2005, a person is prohibited from operating a schoolbus unless the person has a valid commercial driver's license with a passenger endorsement and possesses a schoolbus driver's certificate. This new law would require the Department of Motor Vehicles to issue a schoolbus endorsement to operate a schoolbus without a schoolbus certificate for an operator who is employed as a schoolbus mechanic or a schoolbus driver-trainee provided the endorsement is restricted to operation when there is no pupil being transported. Additionally, this law would authorize the holder of a Class M2 driver's license to operate a motorized scooter.

HIGHLIGHTS:

- Section 12804.9 VC currently authorizes the holder of a Class C driver's license to operate a motorized scooter on the highway.

- This law amends Section 12804.9 VC to authorize the holder of a Class M2 driver's license to operate a motorized scooter.

NOTES:

VEHICLES: POCKET BIKES

Vehicle Code Sections 473, 9955, 21720, 21721
Chapter 323 / Assembly Bill 1051

SUMMARY: This law defines the term "pocket bike" as a two-wheeled motorized device that has a seat or saddle for the use of the rider, and is not designed or manufactured for highway use. This law requires pocket bike manufacturers to affix a sticker onto the pocket bike disclosing that operation on a highway, sidewalk, roadway, bikeway, equestrian trail, hiking trail, or public lands open to off-highway motor vehicle use is prohibited. Additionally, anyone who operates a pocket bike on a highway, or other specified areas, would be guilty of an infraction, and the pocket bike is subject to seizure.

HIGHLIGHTS:

- Section 473 VC defines a pocket bike as a two-wheeled motorized device that has a seat or saddle for the use of the rider, and is not designed or manufactured for highway use. A pocket bike does not include an off-highway motorcycle.

- Section 9955 VC requires manufacturers of pocket bikes to affix on the pocket bike a sticker with a disclosure stating that the device is prohibited from being operated on a sidewalk, roadway, or any part of a highway, or on a bikeway, bicycle path or trail, equestrian trail, hiking or recreational trail, or on public lands open to off-highway motor vehicle use.

- Section 21720 VC is the enforcement section which provides that a pocket bike shall not be operated on a sidewalk, roadway, or any part of a highway, or on a bikeway, bicycle path or trail, equestrian trail, hiking or recreational trail, or on public lands open to off-highway motor vehicle use.

- Section 21721 VC authorizes peace officers to cause the removal or seizure of a pocket bike upon the notice to appear for a violation of Section 21720 VC. A pocket bike so seized shall be held for a minimum of 48 hours.

NOTES:

CASE

LAW

SUMMARIES

People v. Davis

(2005) 36 Cal.4th 510

SUBJECT: Dependent Adult Abuse; Mandated Reporters

RULE: (1) The warrantless eavesdropping on the conversations of inmates, even if they are pretrial detainees, and even if done for the express purpose of collecting evidence, is lawful. (2) Tricking an in-custody suspect who has already invoked into making incriminating statements is the functional equivalent of an interrogation.

FACTS: Defendant and Brian Wright were arrested in an unrelated case. Defendant made bail but Wright did not. In an effort to secure bail money for Wright, defendant enlisted the aid of three other friends; DeAndre Brown, Damon Redmond and Donald Bennett, to commit an armed robbery. Although they all lived in South Central Los Angeles, the planned robbery was to occur at a liquor store in Barstow, in neighboring San Bernardino County. The four would-be robbers, however, needed a car. Armed with a nine-millimeter Uzi semi-automatic pistol and a .38 caliber handgun, they drove to Westwood in Bennett's truck where they found Michelle Boyd and Brian Harris, two college students, sitting in Harris' Honda. Defendant and Redmond kidnapped Boyd and Harris in a carjacking of Harris' car. They then drove the two victims to an remote field where defendant executed them, shooting each of them in the head. Using Harris' Honda, they drove to Barstow to commit the robbery but changed their minds when they got there. They returned home empty-handed and set the Honda on fire in an alley to cover their tracks. The vehicle arson investigation led to the discovery that Boyd and Harris were missing. The discovery of Redmond's fingerprints in the Honda eventually led to the arrest of all four suspects and the recovery of the Uzi. Brown, who eventually became a witness for the prosecution, decided to cooperate and led investigators to where Boyd and Harris were executed. He also ratted off defendant as the triggerman. When interrogated, Redmond and Bennett admitted only to being at the scene of the murders. Defendant invoked his right to silence. Redmond, Bennett and defendant were then put into a felony holding area of the West L.A. Police Station where their conversations were surreptitiously recorded. Before leaving the suspects all together, the investigator inferred to the defendant that his fingerprint had been found on the trigger of the Uzi (an untrue fact). Defendant, Redmond and Bennett, frightened by this information, made incriminating statements that were later used to convict defendant of two counts of first degree murder with special circumstances, and other offenses. Defendant was sentenced to death. His appeal to the California Supreme Court was automatic.

HELD: The California Supreme Court unanimously affirmed defendant's conviction and sentence (except to dismiss a count of robbery of the victim Boyd). Among the host of issues raised by defendant on appeal was the legality of the surreptitious eavesdropping on defendant's conversation with Redmond and Bennett in the police station holding area. Although an investigator testified that the reason they tape-recorded the suspects' conversation was to listen for indications that they might intend harm to Brown, the deputy district attorney assigned to the case testified (by stipulation) that he had suggested they eavesdrop on the suspects in order to determine who the triggerman was. Defendant's arguments were that (1) surreptitious eavesdropping on jail inmates is only lawful when done for purposes of jail security, and (2) that pretrial detainees had a higher expectation of privacy than convicted inmates, precluding such eavesdropping. The Supreme Court rejected both arguments, holding that neither pretrial detainees nor post-conviction inmates have an expectation of privacy in their conversations in a jail. Also, noting that there is a split of authority

on the issue, the Court interpreted the U.S. Supreme Court opinion of *Hudson v. Palmer* (1984) 468 U.S. 517, as holding that it matters not that the purpose of the eavesdropping is to gather new evidence, as opposed to merely being done for purposes of jail security. Also, with the testimony of the investigator that Brown's welfare was at least part of the reason for wanting to eavesdrop on the suspects' conversations, a concern for jail security was at least part of reason it was done. Defendant also argued that for the investigator to hint to defendant that his fingerprint was on the Uzi, and then leave him alone with his coconspirators, was the "*functional equivalent of an interrogation*," and improper where defendant had already invoked his right to silence under *Miranda*. The Court agreed. However, any official compulsion for the defendant to speak was absent once the detective left the room. Therefore, the defendant was no longer in "custody" within the meaning of *Miranda* at the time he made his admissions. As the Court explained, the "coercive atmosphere of custodial interrogation was lacking."

NOTE: The detective in this case was fortunate, to say the least, to have eliminated *Miranda* custody by quickly departing the jail after interrogating the defendant. Officers are not advised to attempt this technique. Officers should also recognize that the detective in this case violated *Miranda* by questioning the suspect after his invocation of silence. Officers should avoid this as well. On the other hand, California case law is clear that there is no prohibition against tape-recording a defendant's jailhouse conversations (with a cellmate, for example), even after that defendant has invoked either of his *Miranda* rights (so long as his Sixth Amendment right to counsel has not attached as to the crime discussed). In such a case, there is no *Miranda* custody because the coercive atmosphere of a police-dominated setting is absent if the defendant is not being confronted by an officer — even though the defendant is in jail, and therefore, in Fourth Amendment custody. Any statement the defendant makes would be admissible against him at trial. Therefore, had the defendant made his admissions to his cellmate without any prompting from the detective, the admissions would have been clearly admissible, even despite the defendant's prior invocation of his *Miranda* rights. Such a situation would have been preferable because there would have been no *Miranda* violation as there was in *Davis*.

NOTES:

People v. San Nicolas

(2004) 34 Cal.4th 614

SUBJECT: The Effect of a Prior *Miranda* Violation on a Subsequent Interrogation

RULE: Even where the defendant had been previously questioned in violation of *Miranda* and had later invoked his right to counsel, his subsequent *Mirandized* statement will be admissible so long as his earlier statement was voluntary and not the product of improper, coercive police tactics.

FACTS: Defendant returned to the Modesto home of his wife, Mary, upon release from his sixth prison term. Living with them was, among other children, nine-year-old April, Mary's brother's daughter. Having become accustomed to the leisure life of a state prison inmate, defendant often argued with Mary over his refusal to seek employment and support his family. Both Mary and defendant having an affinity for alcohol only exacerbated the problem. Finally, in May of 1990, defendant lost his cool during one of their many confrontations and went after Mary with a kitchen knife. A broken jaw-bone, 17 stab wounds to the chest, and a five-inch laceration to the neck terminated the last argument the two of them would ever have. When an unsuspecting April walked in on him, defendant turned on her and continued is stabbing frenzy, killing her as well. Shortly before April quit breathing, defendant raped and digitally penetrated her comatose body. He then fled to Nevada in his dead wife's car where he was arrested three days later. When first arrested, defendant was asked by a Nevada police officer about the whereabouts of the car. Defendant made several admissions in response. No *Miranda* admonishment was administered. Shortly thereafter, a Modesto detective arrived and told defendant that if he wished to speak with the detective, he would be read his *Miranda* rights. Defendant indicated that he wanted to talk to an attorney first. Six days later, with defendant waiving extradition, the detective picked him up in Reno and drove him to Modesto. While en route, defendant was "inadvertently" shown a newspaper with an article about defendant's crimes and his pending extradition. Twenty-five minutes later, defendant told the detective that he wanted to talk to him about the case. The detective told him to wait until they got to Modesto. Once in Modesto, defendant was for the first time given a full *Miranda* advisal. He waived his *Miranda* rights and confessed. He then repeated his confession to a clinical psychologist who interviewed him at the behest of the District Attorney's Office. The trial court suppressed defendant's admissions made in Nevada, but ruled that his later Modesto confessions, both to the detective and the psychologist, were admissible. Defendant was convicted of two counts of first degree murder with special circumstances and sentenced to death. His appeal to the California Supreme Court was automatic.

HELD: The Supreme Court, in a unanimous decision, affirmed defendant's conviction. The Supreme Court first agreed that anything defendant might have said while in custody in Nevada was properly suppressed by the trial court since there was no *Miranda* waiver up to that point. But the Court disagreed with the defendant's argument that the later confessions in Modesto were the products of the limited un-*Mirandized* questioning to which he was subjected in Nevada. The Court ruled that pursuant to *Oregon v. Elstad* (1985) 470 U.S. 298, so long as the first, un-*Mirandized* statements were voluntary, a later *Miranda* advisal will, most often, serve to make a subsequent confession admissible. Since there was nothing coercive or improper about the defendant's contact with law enforcement in Nevada, his later *Miranda* waiver was sufficient to make his subsequent confession admissible. The Court also noted that it was not necessary for the psychologist to re-advise defendant of his *Miranda* rights, even though he was acting as an agent of

the prosecution, because his interview of the defendant immediately followed that of the detective who had *Mirandized* him. Lastly, the Court rejected the defendant's argument that invoking his right to an attorney, when confronted by the Modesto detective while in Nevada, precluded any later attempt by the detective to seek a *Miranda* waiver. While defendant was correct in citing the general rule (i.e., a request for an attorney makes him off limits for as long as he is in custody), an exception applies when the defendant reinitiates the questioning himself. The defendant did that here by telling the detective during the ride back to Modesto that he now wanted to talk about the case. In reaching this conclusion, the Court ruled that the detective showing him the newspaper article about the murders was not a ploy to cause him to reinitiate, finding that if were, the detective would not have told defendant to wait until they got to Modesto.

NOTE: In discussing the rule of *Oregon v. Elstad*, the Court cited, but did not discuss, the recent decision of *Missouri v. Seibert* (2004) 542 U.S. 600, where it was held that obtaining a non-*Mirandized* confession, followed by a waiver and a second confession, is likely to poison the waiver and make the second confession, as well as the first, inadmissible. The difference between *Seibert* and *Elstad* is that the interrogator in *Seibert* purposely obtained a full, detailed confession before advising the defendant of her rights, and then after obtaining a waiver, went through a second confession, all the while referring her back to her first one whenever she started to play down her culpability. In this present case, as in *Elstad*, there was no such "improper tactic" used to cause the defendant to waive his rights. Playing games with a defendant's mind or attempting to trick a suspect into a waiver will raise a *Seibert* issue and is to be discouraged.

NOTES:

People v. Panah (#1)

(2005) 35 Cal.4th 395

SUBJECT: Miranda; Rescue Doctrine, Defendant's Mental Impairments

RULE: A *Miranda* admonishment is not necessary when the officer's primary motivation is to rescue a missing victim. Also, defendant's mental impairments caused by injuries, drug influence, and medical procedures did not preclude a *Miranda* waiver.

FACTS: Twenty-two-year-old defendant lived with his mother in a Woodland Hills apartment complex, across the courtyard from eight-year-old Nichole Parker's father. On a Saturday in 1993, Nicole was visiting her father, playing in the courtyard. A male business acquaintance of defendant's mother, Ahmad Seihoon, talked briefly with Nicole before leaving the apartment. With defendant's mother already at work, defendant was left alone in the apartment. Within the next hour Nicole disappeared. The police were eventually called and an intensive search begun during which it was learned that Nicole was last seen talking to a man in front of defendant's apartment. Upon knocking on defendant's door, no one answered even though the TV was turned on. When officers returned to defendant's apartment a short time later, there was still no answer at the door but now the TV was turned off. Believing that it was defendant who had been seen with Nicole earlier, a police detective, with the assistance of the apartment manager, entered defendant's apartment (entry #1) and conducted a short cursory search for her. Nothing was found. Defendant had earlier gone to Mervyn's department store where he worked. When defendant's mother returned to the apartment and was told what was going on, she called defendant at Mervyn's for the police, letting them into her apartment (entry #2) so that they could talk to him. Defendant denied knowing where Nicole was. Shortly thereafter, however, defendant left work, only to call his supervisor later to tell him that he would not be returning to the store. Defendant then paged a girl friend, Rauni Campbell, and told her that he had "done something very bad" and that he needed her help. When Ahmad Seihoon found out what was going on, he returned to the scene to tell police that he was the male who had contacted Nicole that morning. The police interviewed him in defendant's apartment at the invitation of defendant's mother (entry #3). Later that evening, defendant showed up at Campbell's apartment with dried blood on his wrists and clothes, and asked her to help him buy some sleeping pills, which she did. After downing some of the pills, defendant admitted to Campbell that he had killed Nicole. Campbell called the police. Defendant, however, fled when they arrived. A search of the area resulted in the discovery of defendant's car with a couple of bloodstained knives in plain sight, and a cord sticking out of the trunk. Fearing that Nicole might be in the trunk, the officers popped the lid, but found nothing. After interviewing Campbell, the police detectives returned to defendant's apartment (with his mother now apparently gone) and made another warrantless entry (entry #4). Upon finding a video camera set up pointing at defendant's bed, but still no sign of Nicole, the officers backed out and obtained a search warrant. Meanwhile, defendant was found and arrested near Campbell's apartment. With his cut wrists and appearing to be under the influence of drugs, he was taken to the hospital. Defendant was questioned by a series of police officers and medical staff over the next few hours without the benefit of a *Miranda* admonishment and waiver, each asking him where Nicole might be. Defendant, while never admitting to having killed her, made a number of incriminating statements. Finally, upon executing a search warrant on defendant's apartment (entry #5), Nicole's naked body was found in a suitcase in defendant's bedroom closet. With evidence that she had been sexually assaulted before death, it was later determined that she died from strangulation and the trauma of a forced sodomy. Defendant was eventually advised of his *Miranda* rights while still at the hospital after which he made some incriminating

statements. He was tried and convicted of first degree murder and a number of sexual assault offenses. The jury sentenced him to death. The appeal to the California Supreme Court was automatic.

HELD: The California Supreme Court unanimously affirmed defendant's conviction and sentence. Regarding *Miranda*, defendant also contested his questioning without a *Miranda* advisal and waiver. However, so long as there was still the possibility that Nicole might still be alive, during which time the officers' primary motivation was to locate and perhaps save Nicole, such questioning outside of *Miranda* is legal. The so-called "*Rescue Doctrine*," as an offshoot of the "*Public Safety*" exception, excuses the lack of a *Miranda* admonishment. Defendant's statements were properly admitted into evidence at his trial. Lastly, the Court held that defendant's eventual waiver of his *Miranda* rights was not affected by his injuries, drug influence or the medical procedures being used at the time.

NOTES:

In re Kenneth S.

(2005) 133 Cal.App.4th 54

SUBJECT: Miranda: Custody & Juveniles

RULE: A juvenile is not in *Miranda* custody if he comes to the police station voluntarily and is told that he is free to leave and not under arrest, even though he is interrogated in a secure part of the jail and the officer decides during the interrogation to arrest him.

FACTS: Defendant, a juvenile, and his two brothers confronted a pizza delivery man in Beverly Hills and, with one of them holding his hand in his shirt as if he had a weapon, demanded either pizza or money. The victim was hit in the face and, as he fell, punched by all three suspects. The victim's fanny pack, car keys and money were taken. An investigation eventually led to defendant and one of his brothers. Los Angeles Police Detective Kirby Carranza called defendant's foster mother and asked her to bring defendant and his brother in for questioning about "crimes . . . in the neighborhood," which she did. At the police station, they were all buzzed into the security area and led upstairs to the interrogation rooms. Separated from his foster mother and brother, with his foster mother but ten feet away, defendant was put into a 7-foot-by-7-foot room with the door left partially open. Carranza thanked defendant for voluntarily coming in and told him that he was not under arrest and that he was free to leave at any time. No *Miranda* admonishment was given. Carranza then talked to defendant for about 25 minutes on such topics as his truancy from school, gangs, and people in the neighborhood. The detective then asked defendant, in a 15 to 20 minute interrogation, about the pizza robbery, telling him that he had information to the effect that he (defendant) was involved. Although defendant initially denied any involvement, little by little he eventually admitted to robbing the victim with his two brothers. Although in his own mind, Detective Carranza determined that defendant was no longer free to leave, he still did not read defendant his *Miranda* rights. It wasn't until the end of the conversation that defendant was given his rights, after which no more questions were asked. With a Juvenile Court W&I § 602 petition filed, alleging a count of second degree robbery, the victim could not identify defendant at the adjudication hearing. But defendant's confession, admitted into evidence against him, was enough for the Juvenile Court judge to initially sustained the petition. However, in a later motion for a new trial, the judge reversed himself, ruling that defendant was in custody at the time of his questioning and that his confession, obtained in violation of *Miranda*, was therefore inadmissible. The People appealed from the Court's dismissal of the petition.

HELD: The appellate court reversed, finding that the defendant's confession was admissible. The issue is whether defendant was in "custody" at the time of his interrogation. Absent custody, there is no need for a *Miranda* admonishment and waiver. "Custody" occurs when there is a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Whether or not a person is in custody requires an evaluation of the "*objective*" circumstances, ignoring the "*subjective*" beliefs of both the officer and the defendant. The only time the officer's subjective beliefs are relevant would be when he communicates that belief in some way to the interrogated defendant. Also, the fact that the officer may have "*focused*" his suspicions on a particular suspect is irrelevant, so long as this focus is not communicated in some way to the defendant. In this case, the objective circumstances involve a situation where the defendant came to the station voluntarily. He was told that he was not under arrest and that he was free to leave any time he wished. His foster mother, although in another room, was only 10 feet away with the door to the defendant's interrogation room left partially open. Defendant was questioned by one officer in a very low

key, low pressure interrogation. And although it took place in a secure area of the police station, which would require a police escort should he choose to leave, this fact alone is insufficient to cause a reasonable person, in light of the other circumstances, to believe that he was not free to terminate the questioning and leave the station. As such, defendant was not in custody for purposes of *Miranda*. Therefore, there was no need for a *Miranda* admonishment and waiver as a prerequisite to the admissibility of his confession.

NOTE: This case involved what we commonly refer to as a "*Beheler admonishment*," per *California v. Beheler* (1983) 463 U.S. 1121. A "*Beheler admonishment*;" i.e., telling a suspect that he is not under arrest and is free to leave, is a technique that, absent other significant factors to the contrary, will generally take the custody out of an interrogation occurring at the police station, eliminating the need for a *Miranda* waiver.

NOTES:

People v. Nguyen

(2005) 132 Cal.App.4th 350

SUBJECT: Miranda Invocations

RULE: A suspect who expresses a desire to speak with an attorney *before* the officers read the suspect his or her *Miranda* rights and *before* the officers seek to interrogate the suspect, has not effectively invoked his or her right to counsel. Moreover, trying to contact an attorney on a cellphone while being arrested is not an unambiguous invocation of the right to counsel.

FACTS: Defendant was a passenger in a vehicle that was lawfully stopped. Upon determining that the driver had a suspended license, the officer decided to impound the car. An inventory search of the car resulted in the recovery of illegal drugs. Defendant was arrested for transportation and possession of the drugs. When the officer attempted to handcuff defendant, she announced that she was going to call her attorney on the cell phone that she was clutching in her hand. The police took the cell phone from the defendant and told her she could call her lawyer from the police station. About 15 to 20 minutes later, after being transported to the police station, defendant waived her *Miranda* rights and made some damaging statements. The defendant brought motion to suppress the statement arguing that she had invoked her Miranda rights by attempting to call her attorney and any subsequent contact was improper. The trial court denied her motion. She later appealed from her conviction.

HELD: Generally, a defendant may not "anticipatorily" invoke his or her *Miranda* rights. Any attempt to invoke one's rights before an interrogation is imminent is legally ineffective. In order for a defendant to invoke his *Miranda* rights the authorities must be conducting interrogation, or interrogation must be imminent. At the time when defendant in the instant case indicated that she wanted to call her attorney, the officer was in the process of taking her into physical custody, no interrogation was yet even being contemplated. Moreover, in order for an invocation to be legally effective, it must be clear and unambiguous. The defendant's act of clutching her cell phone and announcing she wanted to call her attorney was not a clear and unambiguous invocation of her right to deal with the police through her attorney. It is reasonable to assume that she merely wanted her lawyer to arrange bail rather than have the assistance of the lawyer in dealing with a future custodial interrogation.

NOTES:

People v. Gonzalez

(2005) 34 Cal.4th 1111

SUBJECT: **Invocation of Miranda Right to Counsel**

RULE: An invocation of one's right to an attorney under *Miranda* must be clear and unequivocal to be legally effective.

FACTS: Defendant, known as "Termite," was a member of the "Smiley Hauser clique" of the 18th Street gang, in Los Angeles. Termite was arrested in April, 1998, by LAPD Officers Cuesta and Copeland for possession of rock cocaine. Convicted and sentenced to probation, Officer Copeland popped defendant again in early August for drinking in public, irritating defendant even more. The next day, Officer Copeland found some fresh graffiti that read; "T*Mite," and "18th St T.M.L.S.", with the word "police" crossed out. This was interpreted to mean that Termite intended to retaliate against, and possibly kill, a police officer. On August 8th, therefore, Officers Cuesta and Gabaldon went looking for defendant. That evening, defendant, packing a pistol, and other 18th Street gang members, crashed a wedding reception. Seeing gang members going into the reception, Officers Cuesta and Gabaldon stopped to investigate as defendant simultaneously left by a rear gate. With the cooperation of the party's hostess who wanted the reception shut down, the officers drove around the block to give the partygoers time to dissipate. While parked in the dark some three or four businesses away, 12 to 15 shots were heard coming from behind them, in rapid succession. Officer Cuesta was fatally wounded with a shot to the head. Defendant, later identified by several witnesses as being the shooter, voluntarily came to the police station several days later for questioning. After being advised of his *Miranda* rights, and while denying any involvement in the shooting, defendant was asked if he would submit to a polygraph examination. To this, defendant responded: "That um, one thing I want to ask you to that, if for anything you guys are going to charge me I want to talk to a public defender too, for any little thing. Because my brother-in-law told me that if they're trying to charge you for this case you might as well talk to a public defender and let him know cause they can't [*untranslatable*]." To this, the detective responded that defendant could have a lawyer whenever he wanted one, and that at the present time they were going to arrest him but that if he passed the polygraph exam, and pending some further investigation, they would later release him without charges. The next day, in preparation to the polygraph examination, defendant asked: "Sir, I was going to ask you that, is there any, like—cause they told me about a public defender. They said that he would show up for anything." After telling defendant that he had a right to a public defendant, there was no more discussion on this topic. Defendant then confessed. Charged with murder and attempted murder, the trial court denied the defendant's motion to suppress his confession, ruling that the defendant's attempted invocation to his right to an attorney was ambiguous, and therefore legally ineffective. Defendant was convicted on all charges and sentenced to life without parole plus a whole bunch of consecutive years. The appellate court reversed, holding that defendant's invocation to his right to an attorney was sufficiently clear, and that his confession therefore should have been suppressed. The People petitioned the California Supreme Court.

HELD: The California Supreme Court, in a unanimous decision, reversed, reinstating defendant's conviction. The law on this issue is quite clear: When a suspect invokes his right to an attorney during a custodial interrogation, all questioning must cease. (*Edwards v. Arizona* (1981) 451 U.S. 477.) But it is equally clear that to be legally effective, the invocation to one's right to an attorney at interrogation must be "clear and unequivocal." (*Davis v. United States* (1994) 512 U.S. 452.) The U.S. Supreme Court has

provided a "bright line" test for law enforcement on this issue. The defendant "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect." The U.S. Supreme Court in *Davis* further noted that although "it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney," police interrogators are not required to do so. In this case, the officers reasonably interpreted defendant's comments to be no more than an expression of his desire for the assistance of an attorney for anything for which he might be formally charged. The officers attempted to explain to him that he was not yet being "charged" with anything, although he was going to be booked pending further investigation for murder. The fact that defendant was not bright enough to understand the difference between being arrested and booked, and being formally charged in court, is not the issue. The test is how a "reasonable officer" would have understood the defendant's comments under the circumstances. In this case, the trial court found that the officers reasonably believed that defendant was only concerned with having an attorney for any offenses with which he might be formally charged. Ignoring his equivocal comments about wanting an attorney, therefore, was proper. Defendant's confession was properly admitted into evidence against him.

NOTES:

United States v. Younger

(9th Cir. 2005) 398 F.3d 1179

SUBJECT: Miranda: Invocation

RULE: An "*implied waiver*" of *Miranda* rights is found under the circumstances of this case. An ambiguous comment about the right to have an attorney is *not* an invocation of one's *Miranda* rights.

FACTS: Officers executed a search warrant at defendant's residence, looking for crack cocaine. Upon complying with the statutory "*knock and notice*" requirements, someone could be heard running inside the house; so the officers forced an immediate entry. Defendant was caught and arrested upstairs just after having tossed a backpack onto the roof from a bedroom window. When the backpack was retrieved, it was found to contain a couple of firearms, including a loaded shortbarrel shotgun, money, crack cocaine and powder cocaine. After bringing defendant downstairs, he was advised of his *Miranda* rights which he acknowledged that he understood. He was never asked, however, if he expressly waived those rights. When defendant noticed that the officers had also detained his girlfriend, he made the spontaneous statement; "(*T*)*hat stuff is mine*. *She don't know about nothing*." An officer specifically asked him if the contents of the backpack was his, to which the defendant responded; "(*E*)*verything in the backpack is mine and* [*she*] *doesn't know nothing about none of that stuff*. . . . (*E*)*verything in the bag is mine*." Defendant was taken to the police station where a formal interrogation was commenced. As they were getting started, defendant asked: "*But, excuse me, if I'm right, I can have a lawyer present* . . . *through all this, right*?" Interpreting this comment as merely confirming that he was entitled to the assistance of an attorney if he wanted one, the officer reread the *Miranda* admonishment to him. Still without an express waiver, defendant was interrogated, making various inculpatory statements. Although showing some reluctance during the interrogation to discuss certain issues without the assistance of an attorney, defendant never specifically asked for one. Indicted in federal court on a number of charges, defendant's motion to suppress his incriminating statements, made both at the house and in the later formal interrogation, was denied. Convicted by a jury, defendant appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. The Court first noted that the failure of the officers to get an "*express waiver*" of his *Miranda* rights, either at the house or again later at the police station, was not grounds for suppressing the defendant's inculpatory statements so long as he *impliedly* waived his rights. Although there is a legal presumption against waiver, whether or not an in-custody defendant intended to waive his *Miranda* rights depends upon an evaluation of the totality of the circumstances. In this case, defendant demonstrated his intent to waive by volunteering various incriminatory comments about ownership of the illegal contents of the backpack. He further continued to answer questions without ever specifically requesting an attorney after having commented on his understanding that he could have one if he so desired. The trial court found under these circumstances that the defendant "*impliedly*" waived his *Miranda* rights. The legal standard on appeal is whether there is "*clear error*" in the trial court's ruling on this issue. Finding that the trial court did not "*clearly err*" on this issue, the Court upheld the trial court's finding of an implied waiver. Secondly, the Court noted that in discussing the defendant's right to the assistance of an attorney during the interrogation, defendant never specifically exercised this right. It is the defendant's obligation to "*unequivocally*" and "*unambiguously*" request the assistance of an attorney during the interrogation for an otherwise apparent invocation of his *Miranda* rights to be legally effective. All

defendant did here, as reasonably understood by the interrogating officer, was to note his understanding that he was entitled to the assistance of an attorney should he so choose. Defendant never specifically requested such assistance.

NOTES:

People v. Roquemore

(2005) 131 Cal.App.4th 11

SUBJECT: Miranda Invocation

RULE: A suspect asking for a lawyer to talk to the officer is *not* a legally effective invocation for purposes of *Miranda*.

FACTS: Defendant and another, both members of a Black street gang, approached two Hispanic males sitting on the steps of an apartment building in Long Beach. The Hispanic males were asked; "*Where are you from*?" When one of them made the mistake of responding with; "*Nowhere*," defendant and the other gangster drew their respective pistols and began firing. Both victims were wounded. Police responded to the scene and physical descriptions of the suspects were put out over the radio. An officer drove to a nearby park and contacted a group of African-American gang members. While talking to these people, defendant, who matched the vague physical description provided by the victims (e.g., two Black males, one tall and one short, wearing black clothing) came running from the direction of the shooting. Seeing the officer, defendant turned and ran in the opposite direction. He was caught in a nearby alley and detained. Defendant was eventually arrested after the two victims identified him in a curbstone lineup as one of the shooters. Defendant was advised of his *Miranda* rights by the arresting officer, once in the patrol vehicle and, after defendant asked to speak again with that same officer, a second time at the police station. After making some vague denials of any knowledge about the shooting, defendant eventually indicated that he was "confused." He then asked: "*Can I call a lawyer or my mom to talk to you*?" The officer did not consider this to be an invocation but terminated the interview because he believed defendant needed time to think. Three days later (but before defendant was arraigned), detectives initiated an interview with the still-in-custody defendant. Believing that defendant had invoked his right to an attorney three days earlier, defendant was *not* re-*Mirandized*. They told him instead that they were *not* there to discuss the shooting of the two Hispanics, but rather that they only wanted to talk to him about other African-American vs. Hispanic gang shootings in the area. Defendant was questioned about the gangs in the area and who belonged to them. Eventually, the discussion led to defendant making admissions concerning his involvement in the shooting of the two Hispanics. He was then given his *Miranda* rights again. This time, however, he invoked his right to remain silent. After being charged with several counts of attempted murder, defendant's motion to suppress his statements to the detectives was denied. He appealed from his conviction.

HELD: The Second District Court of Appeal (Div. 5) affirmed. Defendant argued that he had invoked his right to an attorney when first interviewed, and that it was therefore improper for the detectives to interrogate him three days later. However, case law is clear that any attempt to invoke one's right to an attorney during interrogation must be clear and unequivocal to be legally effective. The Court had no difficulty finding defendant's comment; "*Can I call a lawyer or my mom to talk to you*?" was not an unequivocal invocation of his right to an attorney. As such, it could be ignored. Having ruled that he did not invoke when he commented about a lawyer or his mom talking to the arresting officer, the detectives' interrogation of defendant was not improper. Defendant's incriminatory responses to the detectives were therefore properly admitted into evidence at his trial.

NOTES:

People v. Lopez

(2005) 129 Cal.App.4th 1508

SUBJECT: Miranda Invocation

RULE: An expletive uttered by an in-custody suspect in response to police questioning may be an invocation of his right to silence, depending upon the circumstances.

FACTS: Defendant's neighbor called the police after she heard a loud, boisterous and drunk defendant, drinking with acquaintances in his backyard, threatening to harm African Americans; i.e., to "go get them" and to "blow their house up." The first officer at the scene contacted defendant and attempted to reason with him. Defendant, however, refused to cooperate, cussing at the officer and telling him that he didn't care what his neighbors were complaining about. He demanded that the officer leave. The officer called for cover. Despite attempts to calm him down, defendant remained belligerent, refusing to assure the officer that he would not harm the complaining neighbor. Eventually, defendant squared off against the officer, challenging him to fight. It took three or four officers, pepper spray and a "nylon wrap" to get defendant under control and into the back seat of a police car. During the altercation, defendant spit on one of the officers. He was later admonished as to his *Miranda* rights and questioned as to why he had been so uncooperative. After the first couple of questions and answers, defendant was asked why he resisted arrest. Instead of giving an explanation, defendant responded with a blunt and to-the-point: "Fuck you. I want to talk to my lawyer." Charged with a variety of criminal offenses in state court, the prosecutor was allowed to present testimony of this comment. In closing arguments, the prosecutor argued to the jury that the defendant's failure to explain why he had resisted arrest, saying "Fuck you" was an "adoptive admission," and thus evidence of his guilt. .

HELD: The defendant's expletive was an invocation of his right to silence and should not have been used as evidence of his guilt. It is a general rule that a person's invocation of his or her right to remain silent cannot be used as evidence of guilt. The second half of defendant's response (i.e., "I want to talk to my lawyer") was a clear and unequivocal request for the assistance of counsel. The prosecutor, however, did not attempt to use this half of defendant's response against him, but rather the first half only (i.e., "Fuck you."). Whether or not this first part was in itself an invocation of his right to remain silent is a question of fact that can only be determined by evaluating all the surrounding the circumstances. The Court found that since the defendant's statement came after a *Miranda* admonishment and was so closely connected to what is obviously an invocation of his right to counsel (i.e., the second half of defendant's response), "defendant's entire response must be considered together as a refusal to answer (the officer's last) question as well as an invocation of his right to counsel." Therefore, allowing this statement into evidence and then using it in closing arguments as an adoptive admission was reversible error.

NOTES:

People v. Stitely

(2005) 35 Cal.4th 514

SUBJECT: Miranda: Invocation

RULE: An ambiguous invocation of one's "*right to silence*" (as opposed to the person's "*right to an attorney*"), under *Miranda*, is legally ineffective.

FACTS: Defendant offered Carol Unger a ride home from a bar in Los Angeles County's San Fernando Valley. Carol had been drinking beer for about two and a half hours and dancing with other patrons, including defendant, before accepting defendant's offer of a ride home. The two left together at about midnight. At around 11:00 a.m. the following morning, Carol's partially clad dead body was found in an alley. Evidence indicated that she had been sexually assaulted vaginally and anally, and strangled. Her blood/alcohol level was at .26%. There was also foam debris that apparently came from a vehicle's seat cushions. The investigation eventually led to defendant who was contacted at his work two weeks after the murder. Defendant agreed to go with the detectives to the police station for questioning. Looking into defendant's station wagon, the detectives could see that the foam seats were torn with loose debris similar to that found on Carol's body. Defendant was advised of his *Miranda* rights. Defendant initially denied any contact with Carol Unger. But as he was confronted with other evidence that the two of them had been together the night of Carol's death, he changed his story little by little until finally admitting that they had had "consensual" sex. He also admitted that they had a physical confrontation before he eventually dropped her off, still alive. Defendant denied killing her. Before getting to this point in the interrogation, however, after one of the detectives first suggested that the defendant and the victim might have had a fight, defendant commented: "*Okay, I'll tell you. I think it's about time for me to stop talking*." The detective responded; "*You can stop talking. You can stop talking.* (Deft: "*Okay*.") *It's up to you. Nobody ever forces you to talk*." From here, defendant continued to implicate himself in Carol's death. Tried for murder and other charges, his admissions were used against him at trial. Defendant's appeal to the California Supreme Court from a first degree murder conviction and death sentence was automatic.

HELD: Defendant's conviction was affirmed by the California Supreme Court in a unanimous decision. Among the issues raised by defendant on appeal was his argument that he had invoked his right to silence under *Miranda* when he told his interrogators; "*I think it's about time for me to stop talking*," and that any statements made after that point should have been suppressed. The Supreme Court disagreed. Citing *Davis v. United States* (1994) 512 U.S. 452, the Court noted the rule that an "*ambiguous*" attempt to invoke one's rights under *Miranda* after a prior waiver are legally ineffective. If, under the circumstances, a reasonable interrogating police officer would not have understood defendant's comment to be an invocation of his right to silence, the officer is under no obligation to halt the interrogation or even to seek clarification. Noting that such a rule might well "disadvantage suspects who, for emotional or intellectual reasons, have difficulty expressing themselves," the Court felt that "requiring a clear invocation of rights from someone who has already received and waived them 'avoid[s] difficulties of proof' [Citation], and promotes 'effective law enforcement.'" In this case, the interrogating officer was reasonable in his determination that defendant was merely expressing frustration and did not intend to invoke his rights. Even so, although the detective was not legally required to seek clarification, he nevertheless reiterated for defendant his right to remain silent, giving him the opportunity to invoke. Defendant, however, chose to keep on talking. Having failed to effectively invoke his right to silence, the officers were justified in continuing the interrogation. Defendant's

later incriminatory statements were properly used in evidence against him. This extends the previous holding in *Davis v. United States* from applying the “clear and unambiguous rule” to the invocations of the right to counsel to also include applying the “clear and unambiguous rule” to invocations of the right to remain silent.

NOTES:

Arnold v. Runnels

(9th Cir. 2005) 421 F.3d 859

SUBJECT: Miranda Invocation

RULE: A refusal to talk to interrogators while being tape-recorded is a selective *Miranda* invocation. Such invocation cannot be used in evidence against the defendant. Refusing to answer any question by saying "no comment" is an unequivocal invocation of one's right to silence.

FACTS: After an in-custody defendant waived his *Miranda* rights (both orally and in writing), and spoke with the investigating officers for 30 minutes, the interrogating officer indicated he was going to go on tape. The defendant then said he did not want to go on tape. The interrogating officer nevertheless turned on the tape recorder and began asking the defendant questions. After some initial remarks, the officer recited the facts of defendant's oral and written waiver and asked the defendant if he was correct. The defendant replied, "Yeah." The officer then asked the defendant a series of substantive questions, including whether defendant wanted to give a statement, to each of which defendant replied, "No comment." The officer never asked defendant if he was waiving his right to refuse to speak on tape and defendant never expressly waived that right. The tape recording of defendant's responses was referred to by the prosecutor in his opening statement, introduced at trial, and highlighted in argument.

HELD: A defendant may selectively invoke his *Miranda* rights, i.e., waive as to an oral interrogation but not as to a written statement. In the instant case, the defendant has selectively invoked his right to remain silent while on tape. The court questioned whether the rule requiring an invocation of counsel to be unequivocal also applied to the invocation of the right to remain silent. Nonetheless, it found that, assuming the rule applied to invocation of the latter right, the defendant's invocation was clear and unambiguous. The court rejected the argument that defendant waived his "right not to speak on tape" when he responded, "Yeah," after the officer simply noted that defendant had earlier waived his *Miranda* rights but did not ask for another waiver.

NOTE: There is contrary California case law to the effect that asking to turn off a tape recorder is not necessarily an invocation, depending upon the circumstances. (*People v. Samayoa* (1997) 15 Cal.4th 795, 829-830.)

NOTES:

Illinois v. Caballes

(2005) 543 U.S. 405

SUBJECT: Drug-Sniffing Dogs and Probable Cause

RULE: A dog sniff conducted during a lawful traffic stop is lawful. It is irrelevant that there is no cause to believe that there is anything there for which to sniff.

FACTS: An Illinois State Trooper stopped defendant for speeding on an interstate highway. Another trooper with a narcotics-detection dog showed up unsolicited at the site of the traffic stop. While the first officer was in the process of writing out a warning, the second officer ran his dog around the defendant's car. The dog alerted on the trunk. Based upon this alert, the trunk was searched and marijuana was found. The entire contact from stop to search took about 10 minutes. Finding that the traffic stop was not impermissibly prolonged and that the dog was properly qualified to establish probable cause for a search, the trial court denied defendant's motion to suppress the marijuana. The Illinois Supreme Court reversed, finding that the use of the drug-sniffing dog during the traffic stop "unjustifiably enlarged the scope of a routine traffic stop into a drug investigation." The state petitioned to the United States Supreme Court.

HELD: The United States Supreme Court, in a 6-to-2 decision, reversed the Illinois Supreme Court, thus reinstating defendant's conviction. The issue here is whether the Fourth Amendment requires reasonable, articulable suspicion to justify the use of a drug-detection dog to sniff around the exterior of a vehicle during a lawful traffic stop. The majority of the Court held that it does not. It is irrelevant that there was a change in the purpose of the contact from a traffic stop into a narcotics investigation. Sniffing around the outside of a person's car on the street does not implicate any privacy interest of that person. "Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." Using a narcotics-sniffing dog in these circumstances is not a search. If the dog is properly trained, alerting on an area of the car is probable cause justifying a warrantless search.

NOTE: The lawfulness of a properly trained dog's sniff in establishing probable cause is nothing new. The real value to this case is in shooting down the not uncommon argument that somehow we're violating someone's right to privacy by using an otherwise lawful stop to *merely inquire* into other possible criminality.

NOTES:

People v. Gallardo

(2005) 130 Cal.App.4th 234

SUBJECT: Enlarging the Scope of a Detention

RULE: So long as not prolonged beyond the time period it would take to accomplish the purposes of a traffic stop, other possible illegal activity may be inquired about and a consent to search may be requested, even though the officer has no cause to believe any illegal activity is occurring.

FACTS: Defendant was stopped by Orange County Deputy Sheriff Mark Froome for a broken taillight. After defendant was advised as to the purpose of the traffic stop, and his license and registration were obtained, the deputy asked defendant if he had anything illegal in his car. Defendant said that he did not. The deputy then asked for permission to search his car, and defendant agreed. This all occurred within two minutes of the initial stop. In the search, a small amount of methamphetamine and a pipe for smoking it was found. Charged with possession of methamphetamine and drug paraphernalia in state court, defendant filed a motion to suppress the evidence, alleging that the consent to search and the search itself were the products of an unlawfully prolonged detention. The defendant's argument was threefold: (1) The police may not prolong a traffic stop beyond the time needed to address the traffic violation. (2) The police may not use a traffic stop as a pretext to conduct an unrelated search or investigation. (3) The officer must have a reasonable suspicion of criminal activity before a request for consent to search may be made. The trial court agreed with at least one of these arguments and suppressed the evidence. The People appealed.

HELD: The Fourth District Court of Appeal (Div. 3) reversed. The Court first agreed with defendant that a traffic stop may not be prolonged beyond the time period necessary to address the violation; i.e., a broken taillight in this case. However, other investigative acts beyond the original purpose of the traffic stop are permissible so long as they do not prolong the detention beyond that time period. Here, there was no evidence that the request for consent to search, nor the search itself, prolonged the detention beyond the time period it would have taken to write the citation. Secondly, the U.S. Supreme Court has made it abundantly clear that there is nothing unlawful in using a traffic stop as a pretext to conduct an unrelated investigation. Stopping defendant for a broken taillight was lawful even *if* the deputy had some other subjective motive for wishing to contact defendant. Lastly, there is nothing unlawful in requesting consent to search even without a reasonable suspicion justifying it. Therefore, because all this occurred during a time period that was *not* prolonged beyond what it would have taken to deal with the broken taillight, defendant was neither unlawfully detained nor unlawfully searched.

NOTES:

Muehler v. Mena

(2005) ___ U.S. ___ [125 S.Ct. 1465, 161 L.Ed.2d 299]

SUBJECT: Detentions During Execution of a Search Warrant: Expanding the Scope of the Investigation

RULE: The occupant of a residence may be detained in handcuffs during the execution of a high risk search warrant. Asking a detainee questions about other criminal activity is lawful despite the lack of any reason to believe the detainee is involved in that activity.

FACTS: The Simi Valley Police Department SWAT team executed a search warrant at a residence where Plaintiff Iris Mena lived. The purpose of the warrant was to look for a suspect, weapons, and other evidence in a recent gang-related drive-by shooting. Executing the warrant at 7:00 a.m., Mena was found asleep in her bedroom. Wearing helmets and black vests, adorned with a badge and "POLICE," the officers detained Mena at gunpoint, handcuffing her. Mena and three other occupants of the house were taken to the garage, converted into a bedroom, where she was held in handcuffs for two to three hours while the search was conducted. Officers, and later an INS agent, inquired as to her citizenship status. Finding no evidence to connect her to the drive-by shooting, and after determining that she was a legal resident, she was eventually released with no charges being filed. She later sued in federal court pursuant to 42 U.S.C. § 1983, alleging, among other things, that she had been unreasonably detained in violation of her Fourth Amendment rights; detaining her with unreasonably excessive force and for longer than was necessary. She also complained that she was questioned about her immigration status without cause; also an alleged Fourth Amendment violation. The jury agreed, awarding (minimal) damages against the supervising Simi Valley police officers. The Ninth Circuit Court of Appeals affirmed. The officers petitioned the United States Supreme Court.

HELD: The United States Supreme Court, in a unanimous decision, reversed. The law is clear that when a search warrant is executed, it is *not* unreasonable to detain the occupants of the place being searched. Law enforcement's right to detain the occupants of a house is based upon three legitimate reasons: (1) To prevent flight in the event incriminating evidence is found; (2) to minimize the risk of harm to the officers; and (3) to facilitate the orderly completion of the search. Detaining Mena for the duration of the search was not excessive. The right to detain implies a right to use reasonable force to do so. In this case, where the subject of the search was a gang-related drive-by shooting, with the likelihood of finding weapons and/or a shooting suspect in the house, the use of handcuffs in detaining Mena was justified. The fact that the detention in handcuffs took 2 to 3 hours does not make it any less reasonable when the safety of the officers was of a continuing concern. The Court further ruled that there need not be a reasonable suspicion to believe that a person is in the country illegally in order to justify asking that person about his or her immigration status. Merely asking a person about their immigration status is neither a search nor a seizure. Therefore, to do so is *not* a Fourth Amendment violation.

NOTE: Mena also complained that she was held longer than it took to execute the warrant; i.e., an "illegally prolonged detention." That issue was not discussed by the Ninth Circuit Court of Appeals; the Ninth Circuit already having found that the Fourth Amendment was violated as soon as it was determined that she was not the person listed in the search warrant and she was not released. So the Supreme Court remanded the case back to determine whether a prolonged detention had occurred. But the two issues that were decided

are both extremely important: (1) Holding an occupant of the house being searched in handcuffs for the duration of the search, at least in a high risk situation, is lawful; and (2) the right of a police officer to expand the scope of a detention or a search by simply asking questions, despite the lack of any reason to believe the detainee might have something to admit. Believe it or not, several Ninth Circuit decisions have said that a cop has no constitutional right to be inquisitive. (See *United States v. Chavez-Valenzuela* (9th Cir. 2001) 268 F.3d 719, amended at 279 F.3d 1062; asking for a consent to search during a traffic stop; and *United States v. Murillo* (9th Cir. 2001) 255 F.3d 1169, 1174; asking questions about unrelated criminal activity.) Now, it's okay to be nosey again. (See also *Illinois v Caballes* (2005) 543 U.S. 405.)

NOTES:

People v. Durazo

(2004) 124 Cal.App.4th 728

SUBJECT: Detentions Based upon Stale, Questionable Information

RULE: A stop and detention based upon stale (i.e., four day old) information concerning a threat, which itself was of questionable validity, and with little if anything in the way of suspicious circumstances to connect the persons stopped to that threat, is illegal.

FACTS: A student at California State University at Channel Islands (CSUCI) called the campus police to report that he had been threatened over the telephone by individuals claiming to be Mexican gang members from Oxnard. The suspects threatened to come to his campus apartment. The student claimed to not know why he was being threatened and became "non-responsive," refusing to answer questions, when pressed for detail. Nevertheless, officers watched his apartment the next day. Nothing happened. Four days later at about 7:00 a.m., CSUCI Police Officer Shawn Bartlett observed two Hispanic males in a vehicle turn from the street on which the student lived. As they did so, both males—the defendant being the driver—simultaneously turned their upper bodies and looked in the direction of the student's three-story apartment building. Believing that these persons might be the ones who threatened the student, the officer followed them as their car drove away from the area at the posted speed limit of 20 miles per hour. The officer followed them for about three miles hoping for a traffic infraction or some other excuse to stop them. However, they were meticulous in obeying all traffic laws; an occurrence the officer thought was itself suspicious. After checking the vehicle's license and determining that it was registered to a woman in Oxnard, Officer Bartlett finally decided to stop the car. Once stopped, the vehicle was eventually searched and a semiautomatic pistol, a 30-round magazine and a pair of black gloves were found.

HELD: The Second District Court of Appeal (Div. 6) reversed, finding insufficient reasonable suspicion to justify the traffic stop. In order to justify a detention, including the stopping of a motor vehicle (absent the observation of a traffic infraction which would have warranted a traffic stop), it must be shown that the officer had some articulable reasonable suspicion that the occupants of the vehicle were involved in criminal activity. In this case, the report of a possible pending criminal act was, at the time of the stop, four days old. The report itself was vague, providing no more than the possibility that the victim, who himself was uncooperative, had received threats from Mexican gang members. The officer saw two Hispanic males glance in the direction of the potential victim's apartment, the apartment itself but one among many. And even then, the subjects were driving away from the scene. The officer, in making the stop, was acting on no more (as he admitted in testimony) than his "*gut feeling*," or what is often referred to as a "*hunch*." This is not sufficient cause to justify a stop and detention. The gun, therefore, should have been suppressed as the product of an illegal detention.

NOTES:

United States v. Williams

(9th Cir. 2005) 419 F.3d 1029

SUBJECT: Detentions

RULE: Passengers who exit the vehicle during a traffic stop may be ordered to get back inside the vehicle without there being reasonable suspicion the passenger was involved in wrongdoing.

FACTS: An officer pulled over a car for a violation of Vehicle Code section 24601 (requiring an illuminated rear license plate). The driver did not stop immediately, but after she did, the defendant (who had been in the front passenger seat) got out of the car. The officer ordered the defendant to get back into the car and defendant did so. The officer then walked over to the driver's window and asked the driver for her license and registration. When the driver said she did not have either, the officer had the driver step out the vehicle, handcuffed her, and escorted her back to the patrol car. While this was occurring, the defendant tossed a handgun out of the car's window. The gun was later recovered. At the motion to suppress the gun, the defendant claimed he was illegally seized when he was ordered back inside the car. The motion was denied.

HELD: The Supreme Court has previously held that a police officer may require a driver to remain in his or her vehicle. (*Pennsylvania v. Mimms* (1977) 434 U.S. 106.) It has also been held that a police officer may order both the driver and a passenger out of a vehicle. (*Maryland v. Wilson* (1997) 519 U.S. 408.) These decisions were based upon the need to insure the safety of the officer involved as well as the other passengers. The same reasoning applies to the situation where a passenger is ordered to stay in a vehicle. Traffic stops are dangerous. The intrusion on the passenger's rights that occurs when the passenger is simply ordered to return to where he was moments earlier is minimal and is outweighed by the important interest in the officer's safety. Therefore, if, in the officer's discretion, he or she believes that it is safer to require the passenger to remain in the vehicle, the officer has the right to order the passenger to do so.

NOTE: California authority has gone both ways on this issue. (Compare *People v. Castellon* (1999) 76 Cal.App.4th 1369 [lawful] with *People v. Gonzalez* (1992) 7 Cal.App.4th 381 [unlawful].) *Castellon* found it lawful to order a passenger to get back into the vehicle where the officer articulated some reason to believe that the defendant might be dangerous. This new case does not require even that, recognizing that traffic stops are just inherently dangerous in themselves. Acting in a manner that is consistent with good safety practices, as dictated by an officer’s training, experience, and simple gut feelings, will most often be upheld by the Courts.

NOTES:

In re Lennies H.

(2005) 126 Cal.App.4th 1232

SUBJECT: Pat Searches (Frisks)

RULE: An officer may seize an object during an otherwise lawful pat down for weapons where the officer has probable cause to believe the object is evidence tending to connect the person to a crime even if the object is not believed to be a weapon or contraband (i.e., drugs).

FACTS: Members of the Vallejo police department received information that a Chevy Trailblazer parked on the street had been taken during an armed carjacking the night before by three black males. The officers set up surveillance on the car and saw three black males (including the juvenile suspect) repeatedly walk from a nearby residence, "kind of look around, look at the vehicle, go to the sidewalk again, look at the vehicle and then look side to side up and down the street." The officers then approached the juvenile suspect and his companion as they walked from the vehicle to the residence. One of the officers asked them to stop and said he wanted to talk with them. The officer asked if they had any knowledge about the Trailblazer and if they had any keys in their possession. Both the juvenile and his companion denied having such knowledge and denied possessing any keys. Meanwhile, another officer opened the unlocked Trailblazer and had his K-9 dog sniff the floorboards and driver's seat. The officer then commanded the dog to track. The dog pulled the officer in the direction of where the juvenile, his companion, and the third male (who had been directed to sit on the curb next to the others) were located. The detaining officer then conducted a patsearch of the juvenile and felt what he immediately recognized as keys in the juvenile's pants pocket. The officer did not believe the keys were a weapon but, after the minor denied any knowledge of the keys, the officer removed them. The K-9 officer then pushed a button on the key fob which activated the horn and lighting system of the Trailblazer. The juvenile was arrested and gave a statement.

HELD: A patsearch is limited to an intrusion reasonably designed to discover weapons or other hidden instruments that could be used to assault the police officer. As a general rule, an officer may not search a suspect's pockets during a patdown unless he or she encounters an object there that feels like a weapon. However, under the "plain touch" (aka "plain-feel") exception, an officer may seize an object that is not a weapon, if its incriminating character is “immediately apparent.” Although the plain feel exception is usually applied when an officer feels contraband such as drugs, it may also be applied, as in the instant case, when the incriminating nature of the object is immediately apparent, i.e., there is probable cause to believe the object is evidence of a crime. In the instant case, probable cause to believe the keys were evidence of a crime was established by (i) the matching of the juvenile to the general description of the carjacking suspect; (ii) the repeated inspection of the vehicle by the juvenile; (iii) the tracking of the dog from the vehicle in the direction of the juvenile; and (iv) the discovery of keys in the juvenile's pocket after he previously denied any knowledge of them.

NOTES:

Devenpeck v. Alford

(2004) 543 U.S. 146

SUBJECT: Arresting for the Wrong Offense

RULE: Arresting for the wrong offense does not make the arrest illegal so long as there is *some* offense for which there is probable cause, even if the two offenses are not factually, or closely, related.

FACTS: Jerome Alford, an apparent "*wanabe cop*," stopped to help a stranded motorist with a flat tire. As Alford was leaving, Washington State Trooper Joi Haner stopped at the scene. The motorist told Haner that he thought Alford was a police officer because he had used "*wigwag*" headlights when he stopped to help them. Suspecting that Alford might be impersonating a police officer, Haner took off in pursuit. After catching up with Alford and pulling him over, the Trooper noticed that Alford had in his car a radio that broadcast the communications of the local county sheriff, a portable police scanner, and handcuffs. When asked about the wigwag lights, Alford pretended that he couldn't figure out how to turn them on despite there being a button clearly visible near his right knee that he was conspicuously ignoring. (It was later determined that pushing this button did in fact activate the wigwag lights.) While talking to Alford, and upon the arrival of Haner's supervisor, Sgt. Gerald Devenpeck, it was noticed that a tape recorder on the passenger seat was recording their conversation. Although arresting Alford for impersonating a police officer and obstructing a law enforcement officer was discussed, it was finally determined that charging him with illegally tape-recording a private conversation, in violation of Washington's "Privacy Act," was the better alternative. Upon being arrested for this offense, Alford told the officers that he had a copy of a Washington State Appellate Court decision saying that tape-recording police officers performing their official duties *was not* a violation of Washington's Privacy Act. But no one would read it. The court decision referred to by Alford did in fact say as Alford had represented, and charges against him were eventually dismissed. Alford subsequently filed a civil suit (42 U.S.C. § 1983) in federal court alleging that he'd been illegally arrested. A jury found for the state troopers and Alford appealed. The Ninth Circuit Court of Appeals, in a spilt two-to-one decision, reversed, finding that State Troopers Haner and Devenpeck did in fact violate Alford's federal Fourth Amendment rights by arresting him for an offense for which there was no probable cause. Per the Ninth Circuit, even if the officers had probable cause to charge him with other offenses (i.e., impersonating a police officer and obstructing a law enforcement officer), that fact is irrelevant unless the other offenses are "*closely* (i.e., '*factually*') *related*" to the offense for which he was arrested. (See *Alford v. Haner* (9th Cir. 2003) 333 F.3d 972.) Devenpeck and Haner petitioned to the United States Supreme Court.

HELD: The United States Supreme Court, in an eight-to-zero decision (one justice not participating), reversed, rejecting the Ninth Circuit's "*closely related*" requirement, and remanded the case for further hearings. The rule has been for some time now (since *Whren v. United States* (1996) 517 U.S. 806) that an officer's "*subjective*" reasoning is irrelevant in determining the lawfulness of an arrest. If there was probable cause to arrest for *some offense*, determined by an "*objective*" evaluation of the circumstances, it matters not that the officer chose the wrong offense to put on the booking slip. Interjecting a requirement that the offense for which a person is arrested must be closely related to, "and supported by the same facts as," an offense for which there is in fact probable cause, requires an evaluation of the officer's subjective reasoning. Such a rule violates *Whren*. Therefore, the case must be remanded for a determination of whether the officers did in fact have probable cause to arrest for some other offense. If they did, the arrest was lawful.

NOTES:

United States v. Smith

(9th Cir. 2004) 389 F.3d 944

SUBJECT: Search of a Vehicle Incident to Arrest

RULE: A search incident to arrest may lawfully occur *before* the arrest so long as there exists probable cause to arrest when the search is commenced and the search is "*roughly contemporaneous*" with the eventual arrest.

FACTS: Defendant was stopped by two California Highway Patrol Officers when they clocked him doing 96 miles per hour. When asked for his driver's license and registration, defendant denied having either. Asked his name, date of birth home address, and social security number, defendant verbally gave his brother's personal information, but missed the birth date by one year. And the physical description for the person assigned to the social security number defendant gave them did not match defendant. He was patted down for a wallet, but none was found. So while one officer continued to question defendant about the discrepancies, the other began a search of the car for a wallet and identification. While the car search for the wallet was going on, the first officer continued to question defendant about the discrepancies. Defendant finally admitted to using his brother's personal information. Defendant's wallet, containing a forged driver's license in someone else's name and an identification card in defendant's name, was thereafter found wedged under the rear seat. Defendant was arrested for falsely impersonating another. He then asked the officers to leave the money in the wallet with the passenger in his car. As the officers started to do this, they noted that the currency in his wallet was counterfeit. Charged in federal court with possession of counterfeit currency (18 U.S.C. §§ 2, 472), defendant's motion to suppress the evidence found in his vehicle was denied. Defendant pled guilty and appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. The rule for the Ninth Circuit has always been that a "*search incident to arrest*" is lawful even if the search takes place before the actual physical arrest of the suspect, so long as there existed probable cause to make the arrest when the search was begun, and so long as the search is "*roughly contemporaneous*" with the arrest. The search is "*roughly contemporaneous*" with the arrest if done within a continuous sequence of events, no matter in what order they may occur. In the present case, the officers had probable cause to arrest defendant at that point when it became apparent that he was giving them false information as to his identity. This occurred prior to the initiation of the search, during that time when the information coming back from the CHP dispatcher did not match what defendant was telling them. Although not yet physically arrested, **the officers had probable cause to arrest him when the search of defendant's car was begun**. The fact that the officers did not act on their pre-existing probable cause to physically arrest him until after the search is irrelevant. The search, therefore, was lawful.

NOTE: This is consistent with any number of prior state and federal cases on the issue. And it didn't even take into account other authority that allows for a limited search for identification information when a driver claims to have no ID. So one way or another, this search was going to be upheld. But it's always nice to have a decision out of the Ninth Circuit reflecting a little bit of common sense.

NOTES:

United States v. Mayo

(9th Cir. 2005) 394 F.3d 1271

SUBJECT: Vehicle Searches; Reasonable Suspicion for Detention; Search Incident to Arrest

RULE: The rear cargo area of a hatchback vehicle may be searched incident to the arrest of the vehicle's occupant.

FACTS: A Stockton, California, motel manager called a narcotics officer concerning four suspicious vehicles in the parking lot of her motel that had just arrived there in tandem. The area is one of high narcotics activity. The manager observed individuals from each of the vehicles engaged in conversation in her parking lot. One of the persons handed another a package of some sort. The driver of one vehicle was seen wiping down the steering wheel and door handle of his truck with a rag, and then walking away carrying a backpack. All this appeared suspicious to the motel manager. The narcotics officer sent a patrol officer to check the vehicles. By the time the patrol officer got there, everyone was gone except defendant who was standing next to his Honda Civic hatchback. Defendant provided the patrol officer with identification information when requested to do so, including the registration to the Honda, which he claimed to be purchasing from another person but which he had been in possession for about a month. While doing a records check on defendant, the officer noted that despite having a current sticker on the plate, the registration had expired 3 years earlier. Placing a false registration sticker on a license plate with the intent to defraud is a felony, per V.C. § 4463. Defendant denied any knowledge of this offense. Upon arrival of the narcotics officer, it was determined that defendant had attempted to rent a room using a credit card in the name of another person. Defendant clamed that he had permission to use the credit card because he did not have enough cash. A consensual pat down of defendants' person resulted in recovery of $160.00 in twenty dollar bills. The officers could also smell a chemical odor commonly found at methamphetamine labs. The owner of the credit card showed up and consented to the search of his car. Glass pipes for smoking methamphetamine and an altered driver's license were recovered. Defendant was asked for permission to search his car. However, he repeatedly refused to give his consent. He was therefore arrested for the false registration sticker on his plate and the car was searched "incident to arrest." In the passenger area and in the cargo area of hatchback, behind the rear seat, were found a number of bags of stolen mail. The entire contact lasted as long as 40 minutes. Defendant, charged in federal district court with the possession of the stolen mail, filed a motion to suppress the evidence. Upon denial of his motion, defendant pled guilty and appealed.

HELD: The Ninth Circuit Court of Appeals affirmed, finding the search and the recovery of the mail bags to be lawful. The Court first found that although defendant was detained from the point where the patrol officer first conducted a records check on him, the detention was lawful. Taking into account the "collective knowledge" known by the narcotics officer (as relayed to him by the motel manager, as described above) and the patrol officer's own observations, there was sufficient *reasonable suspicion* to believe defendant, who clearly interacted with the occupants of the other three vehicles, was engaged in some sort of narcotics transaction. The contact with defendant was also not illegally prolonged. Considering the suspicious circumstances that arose as the contact progressed, the officers handled each as it came up in an expeditious manner. Forty minutes was not illegally prolonged, given the circumstances. The Court further ruled that there was a sufficient "fair probability" to believe he had participated in illegally placing the false registration sticker on his car, having admitted to possessing the Honda for a period of a month. The officers were not bound to accept defendant's claim that he knew nothing about the false sticker. Lastly, the Court ruled that the search of defendant's vehicle, incident to arrest, was lawful, and that the area lawfully

searched extended to the cargo area of the hatchback, behind the rear seat. Relying on the holding in *New York v. Belton* (1981) 453 U.S. 454, that an automobile search incident to arrest extends to any area "generally, even if not inevitably, accessible to an arrestee from the passenger area of the vehicle," the Court stated that the hatchback area is more like a part of the passenger compartment, where a search is permitted, than like a conventional vehicle trunk, where a search would not be permitted. Further, it does not matter whether the hatchback cargo area is covered or not.

NOTE: Note that defendant was not even in his vehicle at the time of his arrest. Under the recent U.S. Supreme Court decision of *Thornton v. United States* (2004) 541 U.S. 615, as a "recent occupant" of his vehicle, the interior passenger area (including the hatchback cargo area), as well as all containers in that area, are subject to search incident to his arrest.

NOTES:

People v. Rege

(2005) 130 Cal.App.4th 1584

SUBJECT: Search Incident to Arrest

RULE: A warrantless search incident to arrest may be made of the area immediately accessible to the suspect at the time of the arrest and the search may be made subsequent to his arrest, so long as it is reasonably contemporaneous and nothing has occurred in the meantime to render it unreasonable.

FACTS: San Bernardino Deputy Sheriff John Roe received information that a woman named Alison was selling methamphetamine from a motel room in Victorville. The deputy found a vehicle in the motel's parking lot that was registered to defendant, Alison Rege. A further check revealed that defendant had an outstanding warrant for her arrest. Determining from the motel manager that defendant was staying in room 220, Deputy Roe knocked. Defendant verbally responded, but refused to open the door when told that there was a warrant for her arrest. Deputy Roe eventually forced entry. Defendant was told to lay on the floor, near the foot of a bed, in the 12 by 15 foot, single room, and handcuffed. Portions of a broken glass pipe and a glass vial containing suspected methamphetamine were found outside under the bathroom window. Deputy Roe then searched the area immediately around defendant where she was still lying and found a black pouch containing methamphetamine, marijuana, scales, packaging materials, and drug paraphernalia; all within a three-foot radius. She was charged in state court with possession of methamphetamine for sale. The trial court denied defendant's motion to suppress, finding that the pouch and its contents were found in a lawful search incident to arrest. Defendant pled guilty to possession of methamphetamine and appealed.

HELD: The appellate court affirmed. A search incident to arrest allows an officer, making a custodial arrest, to search the "extended . . . area within (the arrestee's) immediate control, [i.e.] the area from within which he might gain possession of a weapon or destructible evidence." Defendant argued on appeal that because she had been handcuffed and secured, the legal justification for conducting a warrantless search incident to arrest no longer applied. Citing the U.S. Supreme Court decisions of *Chimel v. California* (1969) 395 U.S. 752, and *New York v. Belton* (1981) 453 U.S. 454, the Court noted the well-established rule that the issue in a search incident to arrest situation is where, physically, defendant had been at the time she was arrested. The fact that she may have already been moved away or otherwise incapacitated, making it impossible for her to "gain possession of a weapon or destructible evidence," is not relevant to the legality of a search incident to arrest. The Supreme Court's purpose in establishing this blanket rule was to give law enforcement "[a] single, familiar standard . . . to guide police officers who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." It was also noted that to deprive a police officer of the legal right to conduct a warrantless search incident to arrest just because the suspect has been handcuffed and/or moved from the area to be searched would necessarily put the officer in the position of having to choose between forgoing any search at all, or to do the search before securing the suspect, thus increasing the potential risk involved. The warrantless search incident to defendant's arrest in this case, therefore, was lawful.

NOTE: Remember that for a search incident to arrest to be lawful, the arrest has to be a "custodial" one. This means that it must be contemplated that the arrestee is to be transported from the scene. Where the arrestee is to be merely cited and released at the scene, some legal theory other than a search incident to

arrest (e.g., with probable cause to believe there is evidence there to seize, which might require a search warrant depending upon what it is that is being searched) must be available to justify a search of the arrestee and/or the area around him.

NOTES:

People v. Morgan

(2005) 125 Cal.App.4th 935

SUBJECT: Search Warrants; Use of Telephone Conversations

RULE: The contents of a telephone call to a narcotics dealer's home asking to buy narcotics, answered by the police executing a search warrant, are admissible as an exception to the Hearsay Rule.

FACTS: Narcotics officers, executing a search warrant for methamphetamine at the defendants' home, answered the defendant's phone. The caller asked for defendant Morgan. The officer told the caller she was asleep. The caller stated that he was "bogeying;" street talk for being in need of drugs, and asked the officer if he had any. When asked what he needed, the caller said he wanted a "half *teener*," which is .7 or .8 of a gram. Telling the caller that such a sale was doable, the caller was invited over. He showed up minutes later as promised. The search of the defendants' home resulted in recovery of methamphetamine and evidence that defendants were engaged in the sale of the drug. At the two defendants' joint trial, the officer was allowed to testify to the contents of this phone conversation as non-hearsay, circumstantial evidence that defendants did in fact possess the methamphetamine for purposes of sale. Defendants were convicted and appealed, arguing that admission into evidence of the officer's testimony concerning the contents of the telephone call was error.

HELD: The Third District Court of Appeal affirmed. In so doing, however, the Court disagreed with the trial court's conclusion that the telephone call was admissible as non-hearsay. The so-called "Hearsay Rule" excludes testimony concerning the contents of an out-of-court statement, offered as substantive proof of the truth of that statement, under the theory that the reliability of such statements cannot be tested through cross-examination of the declarant (i.e. the person who uttered the statement now being testified to). Because the truth of the telephone caller's statement to the police officer is relevant in proving that defendants did possess the methamphetamine for purposes of sale, the officer's testimony concerning what was said did in fact constitute hearsay. However, recognizing that "actions speak louder than words," the caller's statements to the narcotics officer here were also what is sometimes called "*non-assertive conduct*," which includes "*non-assertive statements*" or "*implied assertions*." Non-assertive conduct is anything—actions or words—that serves as a substitute for the intentional assertion of a fact. (E.g., fleeing from the police is non-assertive conduct that is a substitute for the person making the statement, "Hey, I'm guilty of committing a crime.") The caller's implied assertion that he wanted to buy methamphetamine is, under the circumstances, a more reliable indicator that defendants were in the business of selling methamphetamine than if that same caller, after his arrest, had told the officers that defendants were selling narcotics. Non-assertive conduct is a judicially (rather than legislatively) created exception to the hearsay rule, which does not need to rely upon cross-examination of the declarant to determine its reliability. Therefore, as an exception to the hearsay rule, the officer's testimony concerning what the caller had said about wanting to buy methamphetamine was properly admitted into evidence.

NOTE: There is pre-existing authority that the telephone caller's statements here are *not* hearsay, but rather admissible as non-hearsay circumstantial evidence of the defendants' dope dealing. (*People v. Nealy* (1991) 228 Cal.App.3d 447; *People v. Ventura* (1991) 1 Cal.App.4th 1515.) Under either theory, the caller's statements are held to be admissible. Having law enforcement answer the phone and document such calls is a powerful source of evidence. Officers may want to include a magistrate's permission to answer in-coming telephone calls in the search warrant. Such calls also are valuable as evidence of

dominion and control over the premises being searched. Lastly, as a separate issue, this Court further determined that the telephone call was "*non-testimonial*," as described in *Crawford v. Washington* (2004) 541 U.S. 36, and thus admissible over a Sixth Amendment "right to confrontation" objection.

NOTES:

People v. Schmeck

(2005) 37 Cal.4th 240

SUBJECT: Warrantless search of property

RULE: Allowing another person free access to a container gives that person the authority to allow the police to search that container.

FACTS: Defendant devised a scheme to make money, and was not hesitant to tell others about it. In accordance with his plan, defendant answered an advertisement in the Auto Trader magazine for a 1978, 22-foot Dodge Brougham motor home, calling the seller and making an appointment to see it. At the same time, defendant arranged with a local dealership to possibly buy it. He met with the victim, who brought all the necessary paperwork to transfer title, and took a test drive. After ostensibly using the vehicle's bathroom, defendant snuck up behind the victim and shot him in the head four or five times. Defendant then dumped the victim's body in a remote area. Prior to taking the motor home to the dealership, defendant tired to clean up all the blood left in it, finally having to cut out a large segment of the carpeting. Noting the large hole in the carpet, the dealer sent him away. Defendant eventually was able to interest a private party in buying the motor home. However, after giving defendant a down payment, the would-be purchaser checked the title in an attempt to determine whether defendant was its true owner. When this didn't check out, he called the police. Defendant was arrested when he tried to obtain the balance of the money owed. The defendant's girlfriend later took police to the victim after defendant had called her and told her to move the body. Two days later, police went to the home of one of defendant's acquaintances where defendant had stored a couple of paper bags containing his belongings. The acquaintance directed the police to her garage and gave them permission to search defendant's bags. In one of the bags, a letter, written by the defendant describing in general terms his plan to obtain "some wheels, . . . probably a van," was found. Defendant's motion to suppress the contents of the bags was denied by the trial court. He was subsequently convicted of first degree murder with the special circumstance that he killed the victim in the perpetration of a robbery. The jury recommended death. The appeal of his death sentence to the California Supreme Court was automatic.

HELD: The California Supreme Court unanimously affirmed defendant's conviction and sentence. Among the many issues raised on appeal was the legality of the warrantless search of the paper bags. Finding the search to be lawful, the Court noted testimony of defendant's acquaintance who indicated that defendant did some sanding and painting in her residence for her. She would then wash defendant's clothing and put them into his bags that she kept in the garage. Defendant was aware that she would go into the bags, and never objected. The Court noted that by permitting the acquaintance common access to the bags, and storing them at her residence, defendant "assumed the risk" that she would allow others to look inside them. "[C]consent of one who possesses common authority over . . . effects is valid as against the absent non-consenting person with whom that authority is shared." To this extent, therefore, defendant's expectation of privacy was diminished to the degree where he did not have the legal right to complain when the acquaintance allowed the police to search the bags. She had the legal authority to allow others, including the police, into the bags.

NOTE: Normally, absent evidence to the effect that the third-party homeowner had common access to the bags, she would not have had the authority to let others look into them. For instance, the Ninth Circuit Court of Appeals held a number of years ago that cardboard boxes belonging to a homeless person, left in a third person's garage, being a place where the homeless person stored his most private belongings, may

not be searched without a warrant or the defendant's consent, at least where there was no evidence of the homeowner's actual or apparent authority to give the officers consent. (*United States v. Fultz* (9th Cir. 1998) 146 F.3d 1102.) The present case is not in disagreement, finding that the Schmeck's acquaintance had the necessary authority to allow the police to search the bags.

NOTES:

United States v. Fay

(9th Cir. 2005) 410 F.3d 589

SUBJECT: Expectation of Privacy; Containers left in Common Areas

RULE: There is no expectation of privacy in a container left in a common area open to others despite being placed in an area that is hard to reach.

FACTS: Defendant, a convicted felon, was shacking up with Mandy Ortiz in Las Vegas, Nevada. Defendant, a gang member, kept a gun in her apartment. In October, 2003, Mandy and defendant had a serious argument. Mandy tried to break off the fight by going to work, but defendant wouldn't let her leave without him. The argument continued to Mandy's work where someone called the police. Mandy told the responding police officer that defendant had a warrant for his arrest and that he had a gun in her apartment. Defendant was arrested on the warrant and the three of them went to Mandy's apartment. Mandy showed the officer a black duffle bag on a high shelf in the apartment complex laundry room where defendant kept his gun. She told the officer that she wanted it out. The officer recovered the bag, noting the distinctive outline of a pistol. A search warrant was obtained and the gun was recovered. Defendant admitted to possession of the gun. His motion to suppress was denied. He pled guilty and appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. In the majority opinion, it was held that defendant did not have any expectation of privacy in the contents of an open duffle bag that was left in a laundry room that is accessible to others, even though on a high, difficult-to-reach shelf. The bag, therefore, was lawfully recovered and searched.

NOTE: The Court inferred, without saying it, that the search warrant was not even needed. Whenever it is held that a person does not have a reasonable expectation of privacy in the place being searched, that person loses his right to object to the search even though executed without a search warrant. Also, in a "concurring opinion," written by the same judge who wrote the majority opinion, it was also noted (as an alternative reason for upholding the search of the duffle bag) that the victim had every right to complain to the police about someone keeping an illegal item in her residence and seeking the help of the police to retrieve that item for purposes of having it removed.

NOTES:

People v. Panah (#2)

(2005) 35 Cal.4th 395

SUBJECT: Warrantless Residential Entries and Exigent Circumstances

RULE: Warrantless entry into a residence is justified by probable cause to believe a missing eight-year-old girl might be inside.

FACTS: Twenty-two-year-old defendant lived with his mother in a Woodland Hills apartment complex, across the courtyard from eight-year-old Nichole Parker's father. On a Saturday in 1993, Nicole was visiting her father, playing in the courtyard. A male business acquaintance of defendant's mother, Ahmad Seihoon, talked briefly with Nicole before leaving the apartment. With defendant's mother already at work, defendant was left alone in the apartment. Within the next hour Nicole disappeared. The police were eventually called and an intensive search begun during which it was learned that Nicole was last seen talking to a man in front of defendant's apartment. Upon knocking on defendant's door, no one answered even though the TV was turned on. When officers returned to defendant's apartment a short time later, there was still no answer at the door but now the TV was turned off. Believing that it was defendant who had been seen with Nicole earlier, a police detective, with the assistance of the apartment manager, entered defendant's apartment (entry #1) and conducted a short cursory search for her. Nothing was found. Defendant had earlier gone to Mervyn's department store where he worked. When defendant's mother returned to the apartment and was told what was going on, she called defendant at Mervyn's for the police, letting them into her apartment (entry #2) so that they could talk to him. Defendant denied knowing where Nicole was. Shortly thereafter, however, defendant left work, only to call his supervisor later to tell him that he would not be returning to the store. Defendant then paged a girl friend, Rauni Campbell, and told her that he had "done something very bad" and that he needed her help. When Ahmad Seihoon found out what was going on, he returned to the scene to tell police that he was the male who had contacted Nicole that morning. The police interviewed him in defendant's apartment at the invitation of defendant's mother (entry #3). Later that evening, defendant showed up at Campbell's apartment with dried blood on his wrists and clothes, and asked her to help him buy some sleeping pills, which she did. After downing some of the pills, defendant admitted to Campbell that he had killed Nicole. Campbell called the police. Defendant, however, fled when they arrived. A search of the area resulted in the discovery of defendant's car with a couple of bloodstained knives in plain sight, and a cord sticking out of the trunk. Fearing that Nicole might be in the trunk, the officers popped the lid, but found nothing. After interviewing Campbell, the police detectives returned to defendant's apartment (with his mother now apparently gone) and made another warrantless entry (entry #4). Upon finding a video camera set up pointing at defendant's bed, but still no sign of Nicole, the officers backed out and obtained a search warrant. Meanwhile, defendant was found and arrested near Campbell's apartment. With his cut wrists and appearing to be under the influence of drugs, he was taken to the hospital. Defendant was questioned by a series of police officers and medical staff over the next few hours without the benefit of a *Miranda* admonishment and waiver, each asking him where Nicole might be. Defendant, while never admitting to having killed her, made a number of incriminating statements. Finally, upon executing a search warrant on defendant's apartment (entry #5), Nicole's naked body was found in a suitcase in defendant's bedroom closet. With evidence that she had been sexually assaulted before death, it was later determined that she died from strangulation and the trauma of a forced sodomy. Defendant was eventually advised of his *Miranda* rights while still at the hospital after which he made some incriminating

statements. He was tried and convicted of first degree murder and a number of sexual assault offenses. The jury sentenced him to death. The appeal to the California Supreme Court was automatic.

HELD: Among the myriad of issues raised by defendant in his appeal was the legality of each of the four warrantless entries into his apartment. The Court rejected each argument in turn, finding the first and fourth entry to be justified by probable cause and exigent circumstances, with the second and third entries consented to by defendant's mother. The first entry, made during the initial stages of the search for the missing Nicole, was based upon the officers' knowledge that a male had been seen talking to Nicole in front of defendant's apartment immediately before her disappearance, and the strange occurrence of the television being turned on and off when no one was answering the door. This, per the Court, was sufficient probable cause to believe that Nicole might be inside. The exigent circumstance of attempting to preserve her life justified the immediate, warrantless entry. The second entry was when the officers followed defendant's mother into the apartment so that they could talk to him on the phone after she called him at Mervyn's. By leading the officers into the apartment without objection, defendant's mother impliedly consented to their entry. The third entry was at the defendant's mother's request so that they could interview Seihoon. The fourth and final warrantless entry was again based upon exigent circumstances, still with the hope that Nicole might still be alive. Once it was determined that it was in fact defendant who had taken Nicole, the need for a more thorough, and immediate, check of defendant's apartment was tantamount despite defendant's claim that she was dead. All four entries, therefore, leading up to the search warrant, were lawful. And even if they were not, nothing was found during any of these entries, so there was nothing to suppress. Defendant also contested the warrantless search of his car; particularly the trunk. This search was held to be lawful under both the "*automobile exception*" to the search warrant requirement and because the officers, still looking for Nicole, were acting with exigent circumstances. Also, nothing of any substance was found, so there was nothing to suppress.

NOTES:

United States v. Martinez

(9th Cir. 2005) 406 F.3d 1160

SUBJECT: Domestic Violence and The Emergency Doctrine: Miranda; Public Safety Exception

RULE: Entry into a residence with a reasonable belief, approximating probable cause, that there is an emergency at hand and an immediate need for assistance, necessary to protect life or property, is lawful under the "*emergency doctrine*." Asking questions about firearms in plain sight at a domestic violence scene, despite the lack of a *Miranda* admonishment, is proper under the public safety exception.

FACTS: A Nampa, Idaho, police officer responded to a 911-hang up call concerning an "*out of control*" male at a specific residence. The officer had been to the same residence once before on a domestic violence-related call, where a male had hit a female giving her a fat lip. Upon arrival, the officer found a "very upset, crying" female in the front yard. While attempting to talk to her, and noting a lack of any injuries, the officer could hear "angry, hostile yelling" coming from within the residence. Believing that someone inside might be injured, and while also fearing that whoever was doing the yelling might suddenly come out with a weapon, the officer entered the residence intending to check the welfare of its occupants. Inside, a young boy was found standing in a doorway. The officer asked the boy if the doorway would lead to the man doing the yelling. Getting an affirmative response, the officer followed the sound of the yelling through a laundry room and hallway to a bedroom where he found defendant kneeling on the floor and reaching under a bed. Defendant was yelling something to the effect that "he was going down for this." Fearing that defendant might be reaching for a weapon, the officer told him to come into the living room so that he could figure out what was going on. Defendant complied. In the living room the officer noticed for the first time a couple of rifles and a shortened-barrel shotgun resting against a couch. The officer immediately asked defendant; "What are these doing here?" Defendant responded that he was trying to get rid of them because he knew the police were coming. Because defendant had a prior felony record, he was charged in federal court with being a felon in possession of a firearm. After his motions to suppress both the firearms and his statement were denied, defendant pled guilty and appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. Noting that there are two general exceptions to the search warrant requirement for home searches—"*exigency*" and "*emergency*"—the Court found the entry in this case to be justified by the later. For an entry and search without a warrant to be lawful under the "*exigent circumstances*" exception to the search warrant requirement, the officer must have "*probable cause*" to believe that contraband or evidence of a crime will be found and that exigent circumstances exist. "*Exigent circumstances*," for purposes of this rule, are present when a reasonable person would believe that entry was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence was about to occur, a suspect was about to escape, or something else was about to occur that would frustrate legitimate law enforcement efforts. Here, there was nothing to support an argument that the officer believed evidence or contraband would be found inside. Therefore, this theory did not justify the officer's entry and search. However, the Court found that the "*emergency doctrine*" did apply. Under the "*emergency doctrine*," an officer may make a warrantless entry if (1) he has reasonable grounds to believe there is an emergency at hand and an immediate need to protect life or property, (2) the search is *not* primarily motivated by an intent to arrest someone or seize evidence, and (3) there is some reasonable basis, "*approximating probable cause*," to associate the emergency with the area or place to be searched. The Court noted the "combustible nature of domestic disputes," making such calls for police assistance "particularly well-suited for an application of the emergency doctrine." In this case, the officer, being aware that this residence had been the scene of at least one prior incident of domestic violence, "reasonably

believed there was an emergency at hand and an immediate need for his assistance for the protection of life and property." The entry into the residence and search for the person who was doing the yelling, therefore, was lawful. The guns were seen in plain sight during this entry ("His observation was not motivated by an intent to arrest and seize evidence, but rather was incidental to the officer's management of the situation."), and were therefore lawfully seized. Also, the officer's question to the defendant about the guns was proper, despite the lack of a *Miranda* admonishment, under the "*public safety*" exception.

NOTES:

United States v. Quaempts

(9th Cir. 2005) 411 F.3d 1046

SUBJECT: Warrantless Arrests in the Home

RULE: The warrantless arrest of a person while in his own bed, even though within reach of his front doorway, and with the officers outside, is a *Ramey*/*Payton* violation, and illegal.

FACTS: Teresa Compo went to the hospital in Toppenish, Washington, complaining that she'd been raped by defendant. Police officers from the Yakima Nation Police Department responded to the hospital and took her statement, subsequently going to defendant's trailer. Looking through a window, defendant could be seen in his bed near the door. One of the officers knocked on the door and said: "Darrell Quaempts, police officer. I need to talk to you." In response, defendant, without getting out of bed, reached over and opened the door. The officer thereupon told defendant that he was under arrest for sexual assault. Upon being told that it was Compo who had made the complaint, defendant admitted to having been with her. Defendant complied when told to get out of bed and get dressed. He was placed in handcuffs as he came out of his trailer. Evidence was subsequently seized from the trailer during a warrantless search, all of which was suppressed without opposition from the Government. The federal trial court, however, also suppressed defendant's statement about being with the victim under the theory that it was the product of an illegal warrantless arrest in the defendant's home. The Government appealed.

HELD: The Ninth Circuit Court of Appeals affirmed, finding that the warrantless arrest of the defendant in his home was a violation of *Payton v. New York* (1980) 445 U.S. 573. The Government argued that defendant was in the open door of his trailer where, per prior case law, it is *not* a *Payton* violation to arrest a person. (*United States v. Vaneaton* (9th Cir. 1995) 49 F.3d 1423; *United States v. Santana* (1976) 427 U.S. 38.) These cases held that a person standing in the doorway (i.e., the "threshold") of his residence is in a public place where he has no expectation of privacy. In this case, however, defendant was still in his bed when arrested. Although he could reach the door from his bed, he was still within his own residence. Arresting him without an arrest warrant, while defendant was still in his bed, was a violation of *Payton*. The Court further held that it does not matter that the officers did not enter into the trailer to make the arrest. It is the defendant's location, and not the officer's, that is important. The defendant's statement, therefore, was properly suppressed as a product of the illegal arrest.

NOTE: The court in *Payton* has drawn a bright line at the entrance to the house, regardless of the size of the dwelling. While there was probable cause to make the arrest, there was no exigency to justify the warrantless arrest inside the dwelling. This, in state practice, is, of course, known as a *Ramey* violation, per *People v. Ramey* (1976) 16 Cal.3d 263. Had the officers invited the rapist to come out first and then arrested him, it would have been lawful, at least under state authority. (See *People v. Tillery* (1979) 99 Cal.App.3d 975, 979-980; *People v. Green* (1983) 146 Cal.App.3d 369, 377; *People v. Jackson* (1986) 187 Cal.App.3d 499, 505.)

NOTES:

People v. Middleton

(2005) 131 Cal.App.4th 732

SUBJECT: **Parole Searches**

RULE: Determining that a person is on parole is enough information to justify a police officer's assumption that the parolee is subject to a search condition (i.e., a Fourth waiver)

FACTS: Police conducting a security check of a motel came to suspect that individuals were smoking marijuana in one of the rooms. The officers determined that the motel room was registered to a parolee named Hurth and decided to conduct a parole search of the room. The officers forcibly entered the motel room. Five people were inside, including the defendant but not the parolee. Inside the room, the police located a firearm which defendant eventually admitted belonged to him. The defendant, who had a key to another room, gave that key to the officers in order to allow them to search for the parolee in defendant's room. Officers located drugs, more firearms, and money, and stolen property in defendant's room. On appeal, the defendant argued that his detention and consensual search of his room was the product of an illegal entry into the room registered to the parolee. Defendant's contention that the entry into the parolee's room was unlawful was based upon the fact that the officers had failed to verify that the alleged parolee was subject to a search condition, i.e., a "Fourth waiver."

HELD: A search condition for every parolee is expressly required by Penal Code section 3067(a). Other pertinent sections of the Penal Code contemplate that all parolees shall be subject to a search condition. Thus, an officer's knowledge of a person's parole status is equivalent to knowledge of a parole search condition. It does not make a difference when the parolee was placed on parole. Once the officer knows the person is on parole, the officer does not need reasonable suspicion of criminal activity to conduct a parole search.

NOTE: The rule that knowledge a person is on parole equates to knowledge the person has a parole search clause does not hold true for a "probationer." Not all probationers have search clauses. Also, the *Middleton* court recognized that the Ninth Circuit's former opinion (opinion now withdrawn, see new opinion at ___ F.3d ___ [2005 WL 3338300] and summary included in this workbook) in *Moreno v. Baca,* 400 F.3d 1152 (9th Cir. 2005) had stated that an officer needs reasonable suspicion to conduct a parole search. The *Middleton* court, however, held that it was bound by the decision of the California Supreme Court in *People v. Reyes* (1998) 19 Cal.4th 743, 752-753 to uphold parole searches that lack reasonable suspicion so long as the search was not conducted for an arbitrary, capricious, or harassing purpose. The issue of whether reasonable suspicion is needed to conduct a parole search is currently pending before the United States Supreme Court in *Samson v. California*, No. 04-9728.

NOTES:

Moreno v. Baca

(2005) ___ F.3d ___ (2005 WL 3338300)

SUBJECT: Belatedly Discovered Search Conditions

RULE: Belatedly discovered search and seizure conditions and arrest warrants cannot be used to justify a search and/or arrest done without probable cause.

FACTS: Two Los Angeles County Deputy Sheriffs observed Richard Moreno and Joe Rodriguez walking in a "high crime" area of the City Terrace area of Los Angeles at about 7:00 p.m. Moreno appeared to be startled when he saw the patrol car, reached into his pocket as he turned away, and tossed something onto the front steps of a nearby residence. Moreno later, in court, denied these facts. The deputies stopped and detained Moreno and Rodriguez. Both subjects were patted down for weapons; their pockets were emptied onto the hood of the patrol car (i.e., a "search"); and they were put into the patrol car's locked back seat while a computerized check was made for warrants (arguably, an "arrest"). One of deputies checked the area where Moreno had tossed something and found a baggie of rock cocaine. Moreno then admitted that he was on parole. The warrant check confirmed this fact and also revealed that Moreno had an outstanding arrest warrant. Moreno was later tried for possession of a controlled substance and acquitted in a jury trial. He subsequently sued in federal court, alleging that he was illegally arrested and searched. Defendants in the law suit (the L.A. Sheriff's Office and the deputies involved) moved for a summary judgment (i.e., to dismiss the law suit). The motion was denied, and the deputies appealed.

HELD: The Ninth Circuit Court of Appeals affirmed, finding that Moreno had been arrested and searched without sufficient cause. First, the Court assumed, for purposes of appeal, that "the conditions under which Moreno was stopped, searched, and detained were such as to justify a parole search and detention, had the officers known that Moreno was on parole before acting." The Court further assumed that Moreno's arrest and the subsequent search would have been lawful if done pursuant to his outstanding arrest warrant. However, the facts were "undisputed" that Deputies Banks and Garcia were not aware of Moreno's parole status or of the outstanding arrest warrant at the time of the seizure. Accordingly, the Court determined that law enforcement cannot justify an arrest nor a search based upon an arrest warrant and a search condition that they didn't know about at the time. Because the deputies should have known this rule, they are not entitled to qualified immunity from civil suit. The trial court therefore properly denied the deputies' motion for a summary judgment.

NOTE: The Ninth Circuit issued an order withdrawing its former opinion in this case (see 400 F.3d 1152 (9th Cir. 2005)), in which a two-judge majority had stated that California parole searches must be supported by reasonable suspicion. The prior decision threatened all suspicionless parole and probation searches in the state because it provided grounds for 42 U.S.C. section 1983 liability when officers followed state law. Under California law, reasonable suspicion is not a prerequisite to a lawful parole search. (See Pen. Code, § 3067; *People v. Reyes* (1998) 19 Cal.4th 743.) This amended opinion, filed by a unanimous panel, deleted its prior challenges to the lawfulness of California suspicionless parole searches. The panel decided the case based solely on the officers' lack of prior knowledge that Moreno was subject to a search condition and wanted on an arrest warrant. The former opinion has no force and effect in California in any state or federal proceeding. The issue of whether reasonable suspicion is needed to conduct a parole search is currently pending before the United States Supreme Court in *Samson v. California*, No. 04-9728.

NOTES:

People v. Pleasant

(2004) 123 Cal.App.4th 194

SUBJECT: Fourth Waiver Searches; Rights of a Cotenant

RULE: A Fourth Waiver search lawfully includes those areas to which a person who is subject to a Fourth Waiver "normally has access."

FACTS: San Diego law enforcement officers went to a probationer's residence for the purpose of conducting a "Fourth Waiver" search. While conducting the search, the officers come upon a locked door. When the probationer was asked if she had a key to the door, she told the officers that the room was her son's room and that her key to the door was on her dresser. Without objection from the probationer, the officers retrieved the key from her dresser and unlocked and entered the room. An illegal assault rifle was found under a bed in the room. The probationer's son, the defendant in this case, is a convicted felon, although not himself subject to a Fourth Waiver. He was later charged with being a felon in possession of a firearm (and an unregistered assault weapon). Defendant's motion to suppress the rifle was denied. He thereafter appealed from his conviction, arguing that the rifle should have been suppressed.

HELD: The Fourth District Court of Appeal (Div. 1) affirmed in a split, two-to-one decision. The case law is quite clear that third parties who live with a person subject to a Fourth Waiver forfeit their right to complain about law enforcement officers conducting a warrantless, suspicionless search of the probationer's (or parolee's) property, including those common areas accessible to both; i.e., areas over which there is "joint control." Specifically, the Court noted that because one occupant of the house was on a Fourth Waiver, "law enforcement authorities could, without a warrant or probable cause, search areas used exclusively by (the probationer), areas within 'common authority' of the probationer and fellow occupants, and areas which (the probationer) normally had access." Areas exclusive to a non-probationer, however, are *not* subject to search under the authority of another's Fourth Waiver. In this case, even though the defendant's room was locked, the probationer had a key to it and did not object when the officers told her they intended to search it, making it reasonable for the officers to conclude that she (the probationer) "normally had access" to the room. As such, it was not unlawful for the officers to enter the room and search it under the authority of the Fourth Waiver.

NOTE: The dissenting opinion disagreed, finding the fact that the room was locked and identified as belonging to another was enough to tip off the officers to the fact that the room was someone else's exclusive area. This is at least a close case. Under these circumstances, it might have been beneficial for

the officers to inquire of the probationer whether she did in fact have access to her son's room. Some other courts might have required such an inquiry.

NOTES:

People v. Gomez

(2005) 130 Cal.App.4th 1008

SUBJECT: Fourth Waiver Searches; Beyond the Scope of the Waiver

RULE: The subjective intent of a police officer conducting a Fourth Waiver search is irrelevant to the lawfulness of the search.

FACTS: Chauncy Washington got caught in Stockton attempting to sell stolen antiques to an antique dealer. The victims of the theft identified their property, but said that there was still "quite a bit more property that was still outstanding." Washington told the arresting officer that he'd obtained the stolen antiques from defendant, providing defendant's home address. The officer went to defendant's home and determined that defendant was on probation and subject to search and seizure conditions. When told by the officer that he was looking for stolen antiques, defendant admitted to having them in his garage. Subject to defendant's search and seizure conditions, the stolen antiques were recovered in a warrantless search of the garage. It was later determined, however, that defendant's Fourth Waiver was for "narcotics, drugs and other contraband" only, with a general provision to "obey all laws." Charged with one count of possession of stolen property, defendant's motion to suppress was initially denied. However, the trial court later reversed itself, relying upon new case law (that was later depublished), holding that because defendant's Fourth Waiver did not include the right to be looking for stolen property, the search of the garage was illegal. The People appealed.

HELD: The Third District Court of Appeal reversed, finding the search to be lawful. When defendant agreed as a condition of his probation to waive his Fourth Amendment search and seizure rights (i.e., a "*Fourth Waiver*") as to narcotics, etc., "he opened to public view those places where narcotics . . . might be found. He could not reasonably have expected those places to remain private during the term of his probation." The fact that the officer was looking for stolen property, and not drugs, is irrelevant. The officer's subjective intent, per the United States Supreme Court, is not an issue. (*Whren v. United States* (1996) 517 U.S. 806.) Therefore, so long as the officer was looking into places where narcotics, drugs and contraband might be found, the search was constitutionally permissible. The warrantless recovery of the stolen antiques, therefore, was lawful.

NOTE: Judges in some counties tend to tailor the Fourth Waiver probationary conditions to the type of offense (such as: "search for stolen property" or "search for deadly weapons.") In those counties, officers still need to check the specifics of the Fourth Waiver to make sure you have a right to be looking into the areas you want to search. For instance, looking into kitchen drawers when the defendant's Fourth Waiver is limited to checking for stolen elephants would still be illegal despite this case.

NOTES:

People v. Jenkins

(2004) 122 Cal.App.4th 1160

SUBJECT: **The 48-Hour Probable Cause Hearing Rule**

RULE: A post-arrest detention may be unduly prolonged under the Fourth Amendment, even if it does not exceed 48 hours, if the officers were not engaged in the necessary administrative functions related to the offense for which the suspect was arrested.

FACTS: Police responded to a 911 call about shots being fired at a particular location in East Oakland. Upon arriving at the scene, one person was found dead in the street with multiple gunshot wounds. A second victim, still alive, was found two blocks away lying on the sidewalk with three gunshot wounds. A witness reported seeing a white SUV flee from the scene, hitting several parked cars in the process. Officers were advised to be on the lookout for such a car with a brown paint transfer and a flat tire. Three hours and forty minutes after the shooting, an officer observed defendant some blocks away driving a white Chevy Blazer with right fender damage and a brown paint transfer. Defendant was lawfully contacted. He was arrested when he couldn't produce a driver's license. It was also noted that a spare tire was being used on the left front wheel. Defendant was transported to the police station for questioning where he waived his *Miranda* rights. Defendant initially claimed only to be a witness to the shooting. After some 16 hours of on-again, off-again questioning, defendant eventually admitted to some limited participation while accusing another person of being the shooter. During that 16-hour time period, the police did not take any administrative steps related to defendant's arrest (e.g., booking, photographing or fingerprinting him). In a later interview after the defendant had been released, he admitted to being the shooter and said that the whole incident was an intended drug rip-off. The defendant was charged and convicted of murder and attempted murder. He appealed, arguing that his interrogation was the product of an illegal arrest.

HELD: The appellate court agreed that defendant had been unlawfully arrested, but concluded that it was harmless error and therefore affirmed his conviction. The court ruled that holding defendant for over 16 hours was an unlawfully prolonged detention under the Fourth Amendment. Based upon what the officers knew at the time defendant was first arrested, the only legal basis for holding him was a charge of driving without a driver's license, per V.C. § 12500, for which he was entitled to be admitted to bail within two hours. (V.C. § 40307) There was *not* sufficient probable cause to arrest him for murder at that time. Under California's statutes, as a murder suspect, the police may hold an arrestee pending arraignment for a reasonable time up to a maximum of 48 hours. (P.C. § 825) But the 48-hour limit is the *outside* limit. Even before the expiration of 48 hours, a delay in arraignment is unreasonable if that time is not being used to (1) complete the arrest, (2) book the accused, (3) for the district attorney to evaluate what charges to file, and/or (4) complete the necessary clerical and administrative tasks to prepare a formal pleading. Such a delay may *not* be used to look for further evidence to justify the arrest. The police in this case used the 16 hours to look for additional evidence to justify a murder charge, finally releasing him when this could not be accomplished. Defendant's statements obtained during the first interview, coming during an impermissibly prolonged detention, should have been suppressed as a product of an illegal detention. Defendant's later confession, however, was *not* the product of the first, illegally obtained statement.

NOTE: There was a day when we didn't need to justify any of the time between arrest and arraignment, so long as we got him to court without 48 hours, exclusive of weekends and holidays. Now, it is becoming clear that we just don't have that luxury any more. And when you look at this as a detention, as opposed to an arrest, it's not surprising that the Court had problems with holding defendant for 16 hours. Holding a criminal

suspect for over 16 hours without probable cause to arrest can only be classified as either an illegal arrest or an unlawfully prolonged detention. Either way, we lose. What the Court is saying here is that we just can't hold him on a misdemeanor driver's license violation for 16 hours while we try to put together a murder case.

NOTES:

United States v. Charley

(9th Cir. 2005) 396 F.3d 1074

SUBJECT: Detentions vs. Arrests; Transporting a Detainee: Fifth and Sixth Amendment Right to an Attorney

RULE: (1) Transporting a detainee is not always a de facto arrest. (2) Asking for an attorney at arraignment is *not* a *Miranda* invocation. (3) Arraignment before an Indian tribal court does not trigger the defendant's Sixth Amendment right to an attorney.

FACTS: Defendant executed three of her six children as they slept in their home on an Navajo Indian Reservation in Arizona, shooting them to death with a .22 caliber semi-automatic rifle. After covering the victims with blankets, she went to the home of her aunt where she visited with her relatives for about an hour. Defendant thereafter returned home to get one of her still-living children, bringing him back to the aunt's house. Defendant then called her estranged husband telling him what she had done, and then the police. A police sergeant and an emergency medical technician responded to the call. Defendant told them that she had done "something very bad," and that she needed the sergeant to check on her children. Defendant added that he, the sergeant, was "going to have to put [her] away for a long time." After talking to defendant's relatives, the sergeant eventually told defendant that she was being detained, that she was not under arrest, and that they would "need" to go to defendant's home to "find out what was going on." Defendant, unhandcuffed, was transported to her home where, after the sergeant made a consensual entry, her three dead children were found. Defendant was arrested and, after a *Miranda* advisal and waiver, interrogated. She confessed to the murders of her children. That evening, an FBI agent obtained a second *Miranda* waiver—this one in writing—and defendant confessed for a second time. The next day, defendant was arraigned on murder and child endangerment charges in the Navajo tribal court. Defendant declined to enter a plea until she had a chance to consult with a lawyer. The court therefore entered a plea of "not guilty" for her. The day after this, the FBI agent picked defendant up from the tribal jail and transported her to the federal district (trial) court. While en route, defendant was again advised of her *Miranda* rights, which she again waived. Defendant confessed for a third time. After defendant's motion to suppress was denied, all three confessions were used at trial in federal court. Defendant appealed from her conviction and life sentence.

HELD: The Ninth Circuit Court of Appeals affirmed defendant's conviction. In so doing, the Court first rejected defendant's argument that she had been arrested on less than probable cause when she was transported from her aunt's house to the crime scene, and that her subsequent confessions should have been suppressed as a product of this unlawful arrest. Whether or not a person has been arrested depends upon what "*a reasonable innocent person in* [*the same*] *circumstances*" would have believed. While being transported without consent is a significant factor in determining that a person has been subjected to a de facto arrest, there are exceptions. The exception applicable here is as follows: "(*T*)*he police may move a suspect without exceeding the bounds of an investigative detention when it is a reasonable means of achieving the legitimate goals of the detention 'given the specific circumstances' of the case*." Here, transporting her home, unhandcuffed, without objection, to check on the welfare of her children, was not an unreasonable step in the detention process, particularly when she had been told that she was only being detained. The Court also rejected defendant's argument that her request to consult with a lawyer at her Indian tribal arraignment was a "*Fifth Amendment*" (i.e., a *Miranda*) invocation. The case law is quite clear that asking for an attorney at an arraignment is *not* a *Miranda* invocation. And lastly, the defendant's "*Sixth Amendment*" right to the assistance of counsel—a separate issue than her Fifth Amendment/*Miranda* right to

an attorney—is *not* implicated until the "*initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information , or arraignment*." Her appearance in an Indian tribal court had nothing to do with the initiation of formal criminal proceedings in the federal trial court. Defendant's Sixth Amendment right to an attorney was not triggered until her arraignment in the federal district court. Therefore, interrogating her after her tribal arraignment did not violate her Sixth Amendment right to an attorney.

NOTES:

People v. McElroy

(2005) 126 Cal.App.4th 874

SUBJECT: Dissuading a victim

RULE: Dissuading a victim from reporting a crime need not involve the use of "*force or fear*" or be by "*violence*" to be a felony. A person can be guilty of "*removing*" a telephone line even when the telephone belongs to the person removing it.

FACTS: Defendant and Daneea Espegren lived together, but didn't get along. On this occasion, a marathon argument over drugs and money went on until 3:00 a.m., only to commence anew when the couple woke up around noon the next day. Espegren unsuccessfully attempted a couple of times to leave until defendant finally hit her in the nose, causing some pain and swelling. He also grabbed her around the neck, leaving a mark. When Espegren attempted to call the police, defendant took the telephone away from her and hung it up. At 4:00 or 4:30 p.m., with the argument still going strong, Espegren tried to use the telephone to call her brother. Defendant took the phone away from her again and unplugged it, telling her she couldn't leave and could not call anyone. Eventually, Espegren got a hold of defendant's cellular phone and called 9-1-1. She then managed to get to a neighbor's house where she awaited the police. Defendant was arrested. Espegren helped police find a firearm hidden in the house, belonging to defendant. Defendant was tried and convicted of being a felon in possession of a firearm (P.C. § 12021(a)(1)), dissuading a victim (P.C. § 136.1(b)(1)), obstructing a telephone line (P.C. § 591), and battery on a cohabitant (P.C. § 243(e)(1)). Upon being sentenced to prison, defendant appealed the P.C. §§ 136.1 and 591 convictions.

HELD: The Third District Court of Appeal (Butte County) affirmed. Defendant first attempted to use the somewhat confusing language of P.C. § 136.1 to argue that absent the use of "*force or fear*," the offense was only a misdemeanor. However, the Court noted that the offense is now (contrary to how the section read prior to 1998) clearly a felony wobbler, in that it imposes (in subdivisions (a) and (b)) the alternative sentences of county jail or state prison. When charged as a felony, as it was here, the offense remains a felony until imposition of a misdemeanor sentence. It is not an element of these two subdivisions that there be any "*force or fear*" applied. When "*force or violence*" *is* used, and is proved to the jury, the offense becomes a straight felony, per subdivision (c). As for the charge of obstructing or removing a telephone line, defendant argued that there was nothing illegal in disabling his own telephone. The Court disagreed, finding that section 591 does not immunize one who "maliciously takes down, removes, injures, or obstructs" his own phone. The statute refers to "*any* line . . . of (a) telephone." The Court also declined to impose a requirement that the telephone line be damaged. Merely unplugging it, which constitutes a "remov(ing)" of the telephone line, is sufficient.

NOTES:

People v. Wallace

(2004) 123 Cal.App.4th 144

SUBJECT: Domestic Violence; Destruction of Community Property; Vandalism

RULE: A spouse is guilty of vandalism when he or she damages or destroys either community property or the other spouse's separate property, whether the harm occurs inside or outside the marital home.

FACTS: Two months into their marriage, Arlissa discovered her new husband, the defendant, trying to smoke crack cocaine. She told him to the leave the house she'd bought years before the marriage but refinanced shortly after. Though the house was still in her name, the Court presumed that defendant had acquire a small community property interest by contributing to the mortgage payments. Defendant did not leave. Instead, he began to tear up the house and break things, ultimately causing damage to the house and its contents in an amount over $15,000. Everything that was broken either belonged to Arlissa or was the couple's community property. It took three officers and a Taser to end the destruction. Defendant appealed from his felony vandalism conviction, his third strike, and the resulting 25-years-to-life sentence, arguing that the destruction of community property inside the house cannot be the basis for a vandalism charge based on "the common law rule that a person's home is his or her castle."

HELD: The Fifth District Court of Appeal affirmed. Defendant's argument was that because a person cannot legally burglarize or trespass into his own home, he likewise cannot be charged when he chooses to destroy it (or its contents). The Court, however, rejected this argument by noting the legal differences between the burglary and trespass statutes and vandalism, particularly the fact that vandalism has a direct effect on a spouse's undivided half-interest in the community property while burglary and trespass do not. Referring to the rule of this case as an "emerging rule," citing a whole host of out-of-state case authority as well reading the holding in California's *People v. Kahanic* (1987) 196 Cal.App.3d 461 more broadly, the Court here found that "a spouse can be guilty of vandalizing community property and the other spouse's separate property inside the marital home."

NOTE: The defendant tried to differentiate *Kahanic* by pointing out that that case dealt only with community property *outside* the home. The Court here held that it makes no difference. A spouse affects the other spouse's interest in the community property when he or she damages or destroys it, irrespective of where that property might be.

NOTES:

Gonzales v. Raich et al.

(2005) __ U.S. __ [125 S.Ct. 2195, 162 L.Ed.2d 1]

SUBJECT: Medical Marijuana and Federal Law

RULE: California's Compassionate Use Act, providing protections for medical marijuana users, does not prevent the federal government from enforcing federal criminal laws prohibiting cultivation and use of marijuana.

FACTS: Plaintiffs Raich and Monson, California residents, used marijuana for medicinal purposes. They were protected from arrest and criminal prosecution by California's so-called "Compassionate Use Act of 1996" (i.e., Proposition 215; H&S § 11362.5). Both suffered from a variety of serious medical conditions and had the necessary physician's authorization to use marijuana. Raich received her marijuana from two anonymous caregivers. Monson grew her own. In 2002, county deputy sheriffs and DEA agents seized and destroyed Monson's six plants. As a result, both plaintiffs sued in federal court seeking injunctive relief, asking that the federal government be prevented from enforcing federal laws related to the medicinal use of marijuana when it conflicted with California's Compassionate Use Act. The federal district court denied plaintiffs' petition, but the Ninth Circuit Court of Appeals reversed. (See *Raich v. Ashcroft* (9th Cir. 2003) 352 F.3d 1222.) The U.S. Attorney petitioned to the United States Supreme Court.

HELD: The United States Supreme Court, in a 6-to-3 split decision, reversed the Ninth Circuit Court of Appeals, holding that federal law enforcement has the right to enforce federal marijuana statutes despite California's Compassionate Use Act. Whether the federal government has the power to legislate, and enforce, anti-marijuana statutes depends upon an interpretation of the U.S. Constitution's "Commerce Clause." If the cultivation and use of marijuana affects "interstate commerce," then the federal government may legislate and enforce federal statutes related to such cultivation and use despite state statutes to the contrary. The Plaintiffs' argument was that the growing of a personal amount of marijuana and the individual use of marijuana for medical purposes is purely a local issue, not affecting interstate commerce. The U.S. Supreme Court disagreed. In enacting the "Controlled Substances Act" in 1970, Congress made a specific finding that; "(i)ncidents of the traffic (of controlled substances) which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce." (21 U.S.C. § 801(3)) Because there is a "rational basis" for Congress's conclusion that even the local cultivation and use of marijuana "exerts a substantial economic effect on interstate commerce," regulation of such activities falls within the purview of the Commerce Clause. Congress, therefore, may lawfully legislate against the cultivation and use of marijuana. Federal law enforcement agencies, therefore, may enforce those statutes despite the existence of conflicting state laws.

NOTES:

People v. Superior Court (Ferguson)

(2005) 132 Cal.App.4th 1525

SUBJECT: Willful Resistance and P.C. § 148.10

RULE: Flight alone constitutes "*willful resistance*" for purposes of P.C. § 148.10(a).

FACTS: Two deputy sheriffs in Vallejo contacted defendant. The deputies soon determined that defendant was giving them a false name and that he had two outstanding felony arrest warrants. As soon as defendant realized that he'd been made, he fled on foot with the deputies in hot pursuit. During the ensuing foot pursuit over fences and through backyards, defendant threw, or attempted to throw, a ladder and a metal scaffolding at the deputies. One deputy lost his footing on a steep, overgrown hill and fell, tearing his back muscles and ligaments, and possibly fracturing his wrist. The other deputy, also falling in the heavy vegetation, broke his arm. Despite their injuries, however, defendant was eventually caught and handcuffed. He was subsequently charged with assault on a peace officer (P.C. § 245(c)) and two counts of the felony offense of "willfully resisting a peace officer resulting in (death or) serious bodily injury" (P.C. § 148.10(a)). Defendant brought a pre-trial motion to dismiss the P.C. § 148.10(a) charges (per P.C. § 995), arguing that his flight did not constitute a "*willful resistance*," as required by the statute. The trial court agreed and dismissed these two counts. The People petitioned for a pre-trial determination of the issue.

HELD: The First District Court of Appeal (Div. 3) agreed with the People and ordered the trial court to reinstate the dismissed counts. The misdemeanor "*resisting*" section, P.C. § 148(a)(1), *is*, per case law, violated when a suspect flees on foot from a lawful detention. (See *People v. Quiroga* (1993) 16 Cal.App.4th 961.) However, the misdemeanor section includes "*willfully resist*(*ing*)," "*delay*(*ing*)" or "*obstruct*(*ing*)" a peace officer in the performance of his or her duties. P.C. § 148.10(a), on the other hand, can only be violated through a "*willful resistance*," the "*delaying*" and "*obstructing*" language not having been included in this section. Because of this difference in the wording of the two statutes, the trial court ruled that merely fleeing from a peace officer did not constitute "*willful resistance*." The appellate court, after a thorough review of the legislative history leading up to the 1990 enactment of P.C. § 148.10(a), disagreed. Noting that P.C. 148.10(a) was intended by the Legislature to be a "*foot pursuit*" alternative to the "*vehicle pursuit*" felony, per V.C. § 2800.3, where a suspect flees in a vehicle resulting in a death or serious bodily injury, the Court ruled that just as with the Vehicle Code version, flight alone, resulting in the death or serious bodily injury of a peace officer, was intended by the Legislature to be construed as a "willful resistance." Defendant, therefore, was properly charged.

NOTES:

In re Ernesto H.

(2004) 125 Cal.App.4th 298

SUBJECT: Threatening teachers, per P.C. § 71

RULE: "*Yell at me again and see what happens*," coming from an angry student who is attempting to distract a teacher from a fight on campus, is a threat intended to influence the performance of the teacher's official duties

FACTS: A physical education teacher on the campus of Soledad High School interrupted two students who appeared to be attempting to engage in a fight. The students claimed to be only playing. A little later, the same two students moved to a secluded area out of the teacher's sight and renewed their confrontation. The defendant, a minor, went with them and stood near the corner of a building where he could see both the combatants and the teacher, acting as a lookout. When the teacher saw what was going on, he headed towards the students. As he did so, defendant yelled, "*maestro, maestro*" ("*teacher, teacher*"). The teacher told defendant that being a lookout was "*not okay*." Defendant responded, "Don't yell at me." The teacher told defendant in a loud voice to move to some other area. Defendant, who appeared upset and serious about what he was doing, took a step towards the teacher, clenching his fists at his sides, and said; "Yell at me again and see what happens." The teacher asked defendant if he was threatening him. Defendant did not deny it. Although the teacher did not believe that defendant intended to do any immediate harm, he did fear the possibility defendant might retaliate in the future. Defendant was sent to the school office. A petition was later filed in Juvenile Court alleging that defendant had violated Penal Code § 71 by attempting to cause an employee of a public educational institution to do, or refrain from doing, any act in the performance of his duties by means of a threat to inflict unlawful injury directly communicated to a teacher. The Juvenile Court judge sustained the petition (while dismissing a P.C. § 422 [criminal threat] allegation). Defendant appealed.

HELD: The Sixth District Court of Appeal affirmed. The purpose of P.C. §71 is to prevent threatening communications to public officers or employees, including school teachers, designed to extort their action or inaction. But because First Amendment freedom of expression rights are involved, the Court recognized that an "eagerness to achieve . . . safety" on school campuses must not go so far as to "trample the essential freedoms which make this country unique." After noting these important principles (in the context of the standard of review that must be used), the Court set out to define the legal limits to enforcing P.C. 71 when a communication is involved. To constitute a violation of section 71, four elements must be proved: (1) A threat to inflict an unlawful injury upon any person or property; (2) direct communication of the threat to a public office or employee; (3) the intent to influence the performance of the officer or employee's official duties; and (4) the apparent ability to carry out the threat. The degree of harm necessary to constitute a sufficient threat for purposes of P.C. § 71 is not specified. While the defendant's statement to the teacher itself is somewhat ambiguous, taken in context (i.e., a serious and upset defendant clenching his fists, moving towards the instructor, etc.) it meets the requirements of P.C. § 71. As to the sufficiency of the evidence to prove that defendant intended to influence the teacher's performance of his duties, it appears from the evidence that it was defendant's intent to prevent the teacher from stopping the fight. In that one of a teacher's responsibilities on campus is to maintain order, this element is satisfied. Also, the court discounted evidence to the effect that the victim teacher might not have believed defendant intended to interfere with the teacher's duties. The teacher's personal belief, on this issue, is not relevant.

NOTES:

United States v. Beck

(9th Cir. 2005) 418 F.3d 1008

SUBJECT: Photospread Identification Procedures; Use of Surveillance Photo Prior to Photographic Lineup

RULE: Showing witnesses a surveillance photograph of the crime itself to refresh the witnesses' recollection does not prejudice an identification from a photographic lineup shown immediately thereafter.

FACTS: Defendant robbed a Portland, Oregon, bank. As he walked out of the bank his photograph was taken by the bank's security system. Three weeks later, the FBI showed defendant's probation officer the photograph of him leaving the bank. The probation officer had met with defendant four times prior to the robbery, for a total of over 70 minutes. At the later trial, the probation officer was allowed to testify that in his opinion defendant was the man depicted in the surveillance photograph. Three witnesses to the robbery were also shown the bank surveillance photograph. Each was then shown a photographic lineup of six similarly appearing males. Two of the eyewitnesses identified the defendant from the photo lineup. Defendant was convicted of bank robbery in federal court and appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. The Court first found that the photo lineup was not impermissibly suggestive, in that it contained pictures of six Caucasian males in the same age range, with similar skin, eye and hair coloring. The test is whether the photospread used was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The photo lineup used was not impermissibly suggestive. As to the use of the surveillance photograph, the Court held that there was nothing wrong with showing the witnesses the bank surveillance photo prior to the photo lineup. "[T]he rights of the accused are not jeopardized when, as here, the recollection of an eyewitness is refreshed by the use of photographs of the crime itself." Use of the surveillance photograph was permitted because it "depicted the actual robber as he left the bank" and not just some possible suspect. As to the probation officer's testimony, giving an opinion that the bank surveillance photo was of the defendant, the Court held that such testimony is proper. "[A] lay witness may give an opinion regarding the identity of a person depicted in a photograph if that witness has had 'sufficient contact with the defendant to achieve a level of familiarity that renders the lay opinion helpful.'" The extent of such prior contacts goes to the weight of such testimony, not to its admissibility. Defendant's probation officer knew defendant well enough to make admissible his opinion.

NOTES:

Kennedy v. City of Ridgefield

(9th Cir. 2005) 423 F.3d 1117

SUBJECT: Civil Liability

RULE: Promising actions related to a person's safety creates civil liability when those promises are not kept, resulting in an injury or loss to that person.

FACTS: On September 6, 1998, Kimberly Kennedy reported to the Ridgefield Police Department (Washington state) that thirteen-year-old Michael Burns had molested Kennedy's nine-year-old daughter. Officer Noel Shields responded to the call and took the report. Mrs. Kennedy also told Office Shields that the Burns family was unstable and that Michael Burns had violent tendencies. She described for Officer Shields a number of violent incidents involving both Michael Burns and his mother, Angela Burns. Mrs. Kennedy expressed fear of reprisal from Michael Burns and asked that she be warned prior to any contact with the Burns over the molestation incident. Officer Shields assured her that she would receive such notice. Two and a half weeks later, not having heard anything yet, Mrs. Kennedy called and left a message for Office Shields asking about the progress of the investigation. When Officer Shields got to work, he checked with the Child Abuse and Intervention Center and left a message for them asking them what was going on. He then decided to drive to the Kennedy's home to tell Mrs. Kennedy personally that he was trying to find out what was happening. While en route, however, he decided instead to stop by the Burns' residence to see whether anyone had made contact with them about the alleged molestation. Upon contacting Angela Burns, he told her for the first time about the Kennedy's allegations, greatly angering Angela. He left the Burns residence with Angela and Michael Burns in a shouting match. Officer Shields then went to the Kennedy's home and told Mrs. Kennedy that he had just told Angela Burns about the pending investigation. This angered Mrs. Kennedy. Officer Shields assured her that officers would patrol the premises, providing her with some measure of protection. Apparently not convinced of their safety, Mr. and Mrs. Kennedy made plans to leave town the next morning. However, that night, Michael Burns broke into the Kennedy's home and shot both Kennedys, killing Mr. Kennedy and seriously wounding Mrs. Kennedy. Michael Burns was subsequently tried and convicted for first degree murder and attempted murder. Mrs. Kennedy later filed a 42 U.S.C. § 1983 civil rights suit against Officer Shields and Ridgefield City, among others, in federal court. Officer Shields' motion for summary judgment (i.e., to dismiss the case prior to trial), claiming qualified immunity, was denied. He appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. The issue in this case is whether Officer Shields unreasonably created a false sense of security in Mrs. Kennedy by agreeing to give her advance notice when the Burns family was contacted about the molestation allegation, and then by falsely assuring Mrs. Kennedy that their neighborhood would be patrolled. On an appeal from a denial of a motion for summary judgment, the court must assume that everything Mrs. Kennedy alleged is true. Officer Shields argued on appeal that assuming that everything Mrs. Kennedy alleged in her lawsuit could be proved, he would still not be liable. Officer Shields claimed the benefit of a law enforcement officer's "*qualified immunity*" from civil liability, arguing that even if he did wrong, he did not violate any "*clearly established constitutional rights*." The Ninth Circuit agreed with the trial judge in finding that if a jury finds Mrs. Kennedy's allegations to be true, then Officer Shields did in fact violate a clearly established constitutional right and is not entitled to qualified immunity. In so holding, the Court noted that a police officer can violate a person's Fourteenth Amendment due process rights if he or she does something to place a person in peril with a deliberate indifference to their safety (called the "*state-created danger*" doctrine). Officer Shields' actions here, by

telling Angela Burns of the Kennedy's allegations of child molestation before giving Mrs. Kennedy prior notification, as promised, placed the Kennedy family in a situation of danger that was greater than they would have faced had he not acted at all. He then aggravated this danger by offering a false promise that the police would patrol the Kennedy's neighborhood. By disregarding the known or obvious consequences of his actions, having been told that Michael Burns was potentially a dangerous person, the Court held that Officer Shields acted with a "*deliberate indifference*" to the Kennedy's safety. Making false promises to protect a person is sufficient to constitute a constitutional violation. Next, the Court found that this "*state-created danger*" doctrine is a clearly established concept of which a reasonable police officer should have been aware. The Court also found that under the circumstances, Officer Shields was on notice that what he did (i.e., creating a false sense of security) was a violation of the Kennedy's constitutional due process rights. Lastly, the Court determined that Officer Shields' errors in judgment in this case, assuming again that Mrs. Kennedy can prove her allegations, were not reasonable errors. With these issues left to be determined, Officer Shields' motion for summary judgment was properly denied.

NOTES:

Meyers v. Redwood City

(9th Cir. 2005) 400 F.3d 765

SUBJECT: Civil Liability; Vehicle Repossession Disputes

RULE: There is no civil liability in taking action to "*preserve the peace*" at a vehicle repossession scene, so long as nothing is done to assist the repossessor in the actual repossession of the vehicle.

FACTS: Plaintiff Elizabeth Meyers was delinquent in her payments on her new Lexus. The financing credit union hired Tri-City Recovery to repossess the Lexus. Tri-City in turn hired Steve Bruno to do the repo. In April, 2001, Bruno arrived at 3 a.m. to take the car out of Meyer's driveway. For reasons that were the subject of some dispute, Bruno knocked at Meyer's door to either tell Meyers that she had personal belongings in the car to retrieve (per Bruno), or to ask for the keys (per Meyers). Meyers objected to Bruno taking the car, telling him that arrangements had been made with the credit union to catch up on her delinquent payments and asking for a few hours to straighten out the misunderstanding. Bruno refused. A scuffle ensued with Bruno and Meyers (and Meyers' mother) becoming involved in a pushing and shoving match. Who was the primary aggressor differed depending upon which party is to be believed. When Meyers attempted to drive the Lexus out of the driveway, Bruno blocked it in with his truck. Meyers then screamed for her father to "get the shotgun," prompting Bruno to call 9-1-1. Officers of the Redwood City Police Department responded and split up the combatants. Both parties gave the Officer O'Keefe their version of the altercation. Bruno claimed that he'd already gained entry to the car before attempting to have Meyers retrieve her personal property. Both Meyers and Bruno told Officer O'Keefe that they wanted the other party arrested. Bruno had blood and scratches on his chest supporting his claim to having been battered. Bruno eventually told the officer that if Meyers would agree to let him take the car, he would not "press charges." Apparently believing Bruno's version of the incident, Officer O'Keefe gave Meyers an ultimatum; either allow Bruno to take the car or be subject to arrest. A police supervisor was summoned who, after being briefed on the situation, told Meyers that her only option to avoid arrest was to give Bruno the car. Meyers finally relented. Meyers and her mother later filed a federal 42 U.S.C. § 1983 civil suit against everyone involved. After the non-municipal defendants were dismissed out of the suit, the officers and the City of Redwood filed a motion for summary judgment (i.e., pre-trial dismissal). The trial court denied the motion. The civil defendants appealed.

HELD: The Ninth Circuit Court of Appeals reversed the trial court and ordered that the motion for summary judgment, in favor of the City of Redwood and its officers, be granted. The California Commercial Code provides a right of repossession for secured creditors without judicial process so long as the repossession can be accomplished without a breach of the peace. (CC § 9609(a)(1), (b)(2)) However, for the sake of argument, the Court assumed that Meyers had been deprived of her "*due process*" rights when her car was seized. The issue in this case is whether the Redwood police officers facilitated the unconstitutional seizure of Meyers' Lexus, in violation of the Fourth and Fourteenth Amendments, without according Meyers "*due process of law."* Resolution of this issue is dependent upon whether the officers were *"so enmeshed in effectuating the repossession that the deprivation and seizure of (her) car is attributable to the state*." In other words; "At what point have the police become so entangled in a private self-help remedy that they may be held to answer under Section 1983 (the federal civil rights law suit section)." The general rule is that while "mere acquiescence by the police to 'stand by in case of trouble' is insufficient to convert a repossession into state action, police intervention and aid in the repossession does constitute state action." It was the trial

court's opinion that the officers here did in fact intervene and aid in the repossession. The Ninth Circuit disagreed. The altercation itself, occurring during Bruno's attempt to repossess the car, took place prior to the officers' arrival. By the time the officers got on the scene, they were confronted with a repossessor who claimed to have completed the repossession process by having "gain(ed) entry" to the car. (B&P Code, § 7507.12) It was not unreasonable for the officer to believe him. And, having been battered, as evidenced by the blood and scratches on his chest, the officers were reasonable in concluding that Bruno had a right to make a citizen's arrest of Meyers. Under P.C. § 142(a) (as this section read in 2001), the officers were obligated to take custody of Meyers if Bruno insisted. So when Bruno made the offer of forgoing a citizen's arrest if Meyers would agree to let the car go, they did nothing wrong by making this offer to Meyers, providing her with the opportunity to avoid being arrested. Meyers, for her part, still had the option of refusing, but then would have been subject to being taken into custody. This dilemma was not of the officers' making. Also, even if it could be argued that the officers did in fact get too involved in the repossession of Meyers' car, they "cannot be faulted for attempting to settle this late-night confrontation peacefully." Finding that the officers acted reasonably "during a tense and difficult situation," the Court held that they are at least entitled to qualified immunity from any civil liability.

NOTE: California statutes allow for repossessions "without judicial process," but that doesn't mean it is constitutional. The Court specifically declined to decide whether, under California's statutes, a vehicle repossessor can lawfully complete the taking of the vehicle when a "breach of the peace" occurs *after* the repossessor has gained entry to the vehicle; i.e., has completed the repossession, but has not yet removed the vehicle from the scene. In practice, we typically tell the delinquent car buyer that by then it is too late to stop the repossessor from taking his car away. If you get involved in helping a repossessor take a vehicle from a deadbeat car buyer, you're subjecting yourself to a potential lawsuit. But, if you stand by merely to preserve the peace, or come to the scene after the repossession is complete and take appropriate law enforcement action to minimize or eliminate the possibility of an altercation, then you're protected.

NOTES:

Smith v. City of Hemet

(9th Cir. 2005) 394 F.3d 689

SUBJECT: Use of Force, Police Dogs and Civil Liability

RULE: Pleading guilty to resisting an officer in the performance of his or her duties does *not* preclude a later civil suit against the officer for using "*excessive force*" where the resisting occurred prior to that use of force. The use of a police dog to subdue a resisting suspect *may* be an unwarranted use of "*deadly force*," depending upon the circumstances.

FACTS: Plaintiff Thomas Smith's wife made an emergency call to the Hemet Police Department complaining that Smith was hitting her. She also reported that Smith did not have a gun and that there were no weapons in the house. The first officer to arrive at the scene found Smith, in his pajamas, standing on his front porch with his hands in his pockets. Smith was told to take his hands out of his pockets. Smith refused. After a second refusal to take his hands out of his pockets, Smith retreated into this house as the officer called for assistance. Upon arrival of a second officer, Smith reemerged from the house with his hands still in his pockets. This time, however, he removed his hands when ordered to do so, but then refused to put his hands on his head and come off the porch towards the officers. More assistance, including a canine unit, was called for. An officer with "*Quando*," a police canine, arrived at the scene. Smith again refused to turn around and place his hands on his head despite being told that if he didn't do as instructed, Quando would be used to subdue him and "*might bite*." Smith was then sprayed with pepper spray, causing him to attempt to flee back into the house. At least four officers grabbed Smith and "slammed him against the door and threw him down on the porch." Quando was then ordered to attack, which he did by biting Smith on the right shoulder, neck and arm. Smith finally agreed to submit, but remained curled up on the porch with one of his hands "tucked in somewhere" out of the view of the officers. Unable to secure both arms for handcuffing, Quando was ordered to bite Smith again, which he did. Smith was then dragged off the porch, still refusing to expose at least on of his hands to view. Quando was ordered to attack again, this time getting Smith in the buttocks. During all this, Smith was pepper sprayed at least four times. Eventually, the officers were able to get him handcuffed. Smith later pled guilty to resisting the officers in the performance of their duties (P.C. § 148(a)(1)), as well as spousal battery (P.C. § 243(e)). He then sued in federal court pursuant to 42 U.S.C. § 1983. The federal district court granted the civil defendants' (i.e., the police officers, et al.) motion for summary judgment (dismissing the lawsuit prior to a trial). Smith appealed. The Ninth Circuit Court of Appeals affirmed (at 356 F.3d 1138 [2004]), but then granted an "*en banc*" (full panel) rehearing.

HELD: A majority of the en banc panel of the Ninth Circuit Court of Appeals, in an 8-to-3 decision, reversed, sending the case back for a civil trial. The first issue was whether plaintiff's plea of guilty to P.C. § 148(a)(1) (i.e., "*interfering with the officers in the performance of their duties*," or "*resisting*") necessarily precludes the filing of a lawsuit based upon the same facts and circumstances. If the officers used excessive force in arresting Smith (and were thus *not* acting in the performance of their duties since they have no "*duty*" to use excessive force), then Smith *cannot* be guilty of resisting that arrest, a charge that he, in his plea of guilty, has admitted. Admitting guilt is inconsistent with the claim in a later civil suit that he had a right to resist. (*Heck v. Humphrey* (1994) 512 U.S. 477.) In answer to that contention, the Court noted that Smith committed a number of violations of "*resisting*" (e.g., refusing to take his hands out of his pockets, and refusing to put his hands on his head and back off the porch), several that occurred *prior to* any alleged use of excessive force. Smith, therefore, *can* bring a lawsuit based upon the alleged *later* use of excessive force,

despite his admission that he was guilty of "*resisting*." The second issue is whether the use of the police dog can constitute "*deadly force*." "*Deadly force*," as conceded by the parties, would have been excessive under the circumstances of this case. Therefore, if a biting police dog is "*deadly force*," then the officers here may have in fact violated defendant's Fourth Amendment rights in the use of excessive force. This same Court has previously held that "*deadly force*," at least in the use of a police dog, should be defined as "*force reasonably likely to kill*." (See *Vera Cruz v. City of Escondido* (9th Cir. 1998) 139 F.3d 659.) The controlled use of a police dog is *not* force likely to kill. *However*, seven other federal circuits, California authority, and the Model Penal Code, have defined "*deadly force*" as "force that creates a substantial risk of death *or serious bodily injury*." Citing the lack of justification for having a different standard for police officers than for everyone else, and adopting the majority rule, the Court here specifically overruled its decision in *Vera Cruz*. Upon remand, therefore, the trial court is to use the majority standard (i.e.; "*force that creates a substantial risk of death or serious bodily injury*") in instructing the jury on the issue of whether the use of a canine under the facts of this case was an unjustified use of "*deadly force*."

NOTE: If this description of such "*police brutality*" bothers you, please note that this is taken from the plaintiff Smith's allegations only, and not necessarily (or even likely) how the evidence will come out at trial. On the legal issues, a minority of three judges, citing California authority (*Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401), noted that Smith *did not* commit four or five separate acts of resisting the officers in the performance of their duties. It was one continuous resistance *during which* the officers eventually used force upon him. As such, under the U.S. Supreme Court's *Heck* decision, he cannot bring suit alleging an excessive use of force after having admitted in a criminal court to being guilty of resisting the officers. On the issue of changing the definition of "*deadly force*," the three minority justices expressed no opinion. And there is no indication as of the writing of this brief that anyone is seeking a review by the United States Supreme Court. So, as it stands right now, any use of a police dog, such an animal certainly being capable of inflicting "*serious bodily injury*," will give rise to the issue of whether it was or was not, under the circumstances of the particular case, an unjustified use of "*deadly force*."

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